

90-994

CASE NO.

Supreme Court, U.S.  
FILED

DEC 10 1990

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1990

\*\*\*\*\*

LEWIS & COMPANY, LAWYERS,  
L. BURKE LEWIS, AMY J. CASSEDY,

Petitioners

vs.

KONSTANTIN THOEREN, PATROLA FILMS, INC.,  
PATROLA, G.m.b.H., ADRIANA INTERNATIONAL  
CORPORATION, HANS A.-KUNZ, KEMAL ZEINAL-  
ZADE, ANTHONY M. MIDGEN, ARIAN FILMS  
PRODUCTIONS, LTD., ARTHUR L. MARTIN,

Respondents

\*\*\*\*\*

ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
NINTH CIRCUIT

\*\*\*\*\*

PETITION FOR WRIT OF CERTIORARI

\*\*\*\*\*

L. Burke Lewis  
22203 Pacific Coast Highway  
Malibu, California 90265  
(213) 317-1285  
Counsel for Petitioners

Of Counsel:

Amy J. Cassedy  
Malibu, California



**QUESTIONS PRESENTED**

1. May a district judge, within the confines of Article III of the U.S. Constitution, 28 U.S.C. §§144 and 455, and the Magistrates Act, 28 U.S.C. §631 et seq., deputize a long-time friend to serve as a surrogate judicial officer without provision for a formal record, conformance with Federal Rules of Civil Procedure, or Article III review, and to be paid by the litigants at the annual rate of approximately \$750,000 on pain of contempt?

2. What is the obligation of a U.S. Court of Appeals to carry out the mandate of this court relative to counsel's duty to disclose a party's attempted perpetuation on appeal of false testimony, sham issues, and sham pleadings?

3. Did the U.S. Court of Appeals for the Ninth Circuit appropriately sanction petitioners for the opening



appellate briefs filed on behalf of  
appellants below?

4. Did the U.S. Court of Appeals  
for the Ninth Circuit appropriately affirm  
awards of sanctions and a finding of  
contempt against petitioners?

5. Did the U.S. Court of Appeals  
for the Ninth Circuit properly deem  
petitioners' petition for rehearing and  
suggestion for hearing en banc as  
untimely?

6. May counsel against whom  
sanctions are imposed by a district court  
be deprived of opportunity for immediate  
appeal, consistent with the due process  
clause of the U.S. Constitution?



**LIST OF PARTIES**

All parties to the judgment sought to be reviewed are set forth in the caption. Counsel is informed and believes that Arthur L. Martin has no interest in the outcome of the petition.



**TABLE OF CONTENTS**

	<u>Page</u>
QUESTIONS PRESENTED.....	i
LIST OF PARTIES.....	ii
TABLE OF CONTENTS.....	iii <sup>a</sup>
TABLE OF AUTHORITIES.....	v
OPINIONS BELOW.....	2
JURISDICTION.....	3
CONSTITUTIONAL AND STATUTORY PROVISIONS.....	3
STATEMENT OF THE CASE.....	4
A. The Crux of this Case.....	4
B. Facts and Procedural History Below.....	8
REASONS WHY CERTIORARI SHOULD BE GRANTED.....	22
I. THE APPOINTMENT OF THE "MASTER" IS UNCONSTITUTIONAL AND CONTRARY TO STATUTE.....	22
II. THE ASSIGNED TRIAL JUDGE SHOULD HAVE BEEN DISQUALIFIED.....	36
III. THE NINTH CIRCUIT IGNORED COUNSEL'S DUTIES MANDATED BY THIS COURT.....	42
IV. THE NINTH CIRCUIT'S IMPOSITION OF SANCTIONS AGAINST PETITIONERS	



REPRESENTS A GROSS DEPARTURE FROM JUDICIAL STANDARDS.....	47
V. THE NINTH CIRCUIT IMPROPERLY AFFIRMED DISTRICT COURT SANCTIONS VIOLATIVE OF DUE PROCESS AND ESTABLISHED STANDARDS.....	53
A. Motion for Reconsideration.....	53
B. Motion to Disqualify Counsel.....	55
C. Sanctions for Deposition....	57
D. Local Rule Sanctions.....	58
E. Contempt Finding.....	59
E. Kordich Should Be Overruled.....	61
CONCLUSIONS.....	63



## TABLE OF AUTHORITIES

	<u>Page</u>
<b>CASES</b>	
<u>Acosta v. Louisiana Dept. of Health and Human Resources,</u> 478 U.S. 251, 106 S. Ct. 2876, 92 L.Ed.2d 192 (1986) .....	53
<u>Alaniz v. Calif. Processors,</u> 690 F.2d 717 (9th Cir. 1982) .....	35
<u>Apex Fountain Sales, Inc. v. Kleinfeld,</u> 818 F.2d 1089 (3d Cir. 1987) .....	25
<u>Barnd v. City of Tacoma,</u> 664 F.2d 1339 (9th Cir. 1982) ...	52
<u>Bell v. Chandler,</u> 569 F.2d 556 (10th Cir. 1979) ....	38
<u>Berger v. United States,</u> 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 488 (1921) .....	36, 37, 39
<u>Cal. Archit. Bldg. Prod. v. Franciscan Ceramics, Inc.,</u> 818 F.2d 1466 (9th Cir. 1987) ...	57
<u>Cher v. Forum International, Ltd.,</u> 692 F.2d 634 (9th Cir. 1982) ....	54
<u>Comden v. Superior Court,</u> 20 Cal.2d 906, 145 Cal.Rptr. 9, 546 P.2d 971 (1987) .....	56
<u>Evans v. Artek Systems Corp.,</u> 715 F.2d 788 (2d Cir. 1983) .....	55



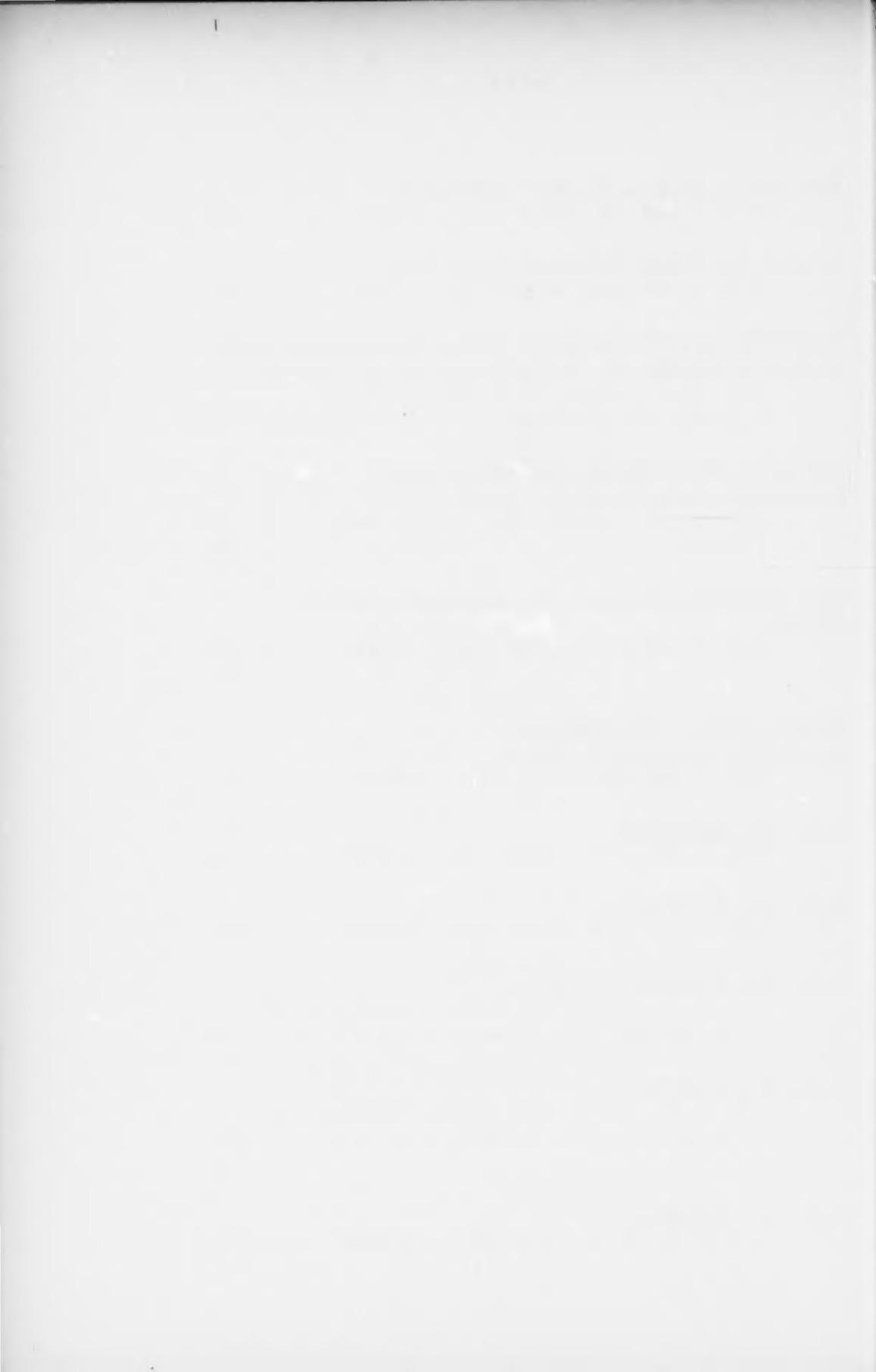
<u>F.D.I.C. v. Tefken Const. and Inst. Co.,</u> 847 F.2d 440 (7th Cir. 1987) ....	62
<u>Fjelstad v. American Honda Motor Co., Inc.,</u> 762 F.2d 1334 (9th Cir. 1985) ...	50
	58
<u>Giebe v. Pence,</u> 431 F.2d 942 (9th Cir. 1970) ....	39
<u>Global Van Lines v. Superior Court,</u> 144 Cal.App.3d 490, 192 Cal.Rptr. 609 (1983) .....	56
<u>Golden Eagle Distributing Corp.</u> <u>v. Burroughs Corp.,</u> 809 F.2d 584 (9th Cir. 1987) ....	43
<u>International Union (UAW) v. N.L.R.B.,</u> 459 F.2d 1329 (D.C. Cir. 1972) ..	31
<u>Kordich v. Marine Clerks Ass'n,</u> 715 F.2d 1392 (9th Cir. 1983)...	22,
	36,
	61
<u>LaBuy v. Howes Leather Co.,</u> 352 U.S. 249, 77 S.Ct. 309, 1 L. Ed. 2d 290 (1957) .....	24,
	25
<u>Liljeberg v. Health Services Acquisition Corp.,</u> 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988) .....	33,
	40,
	41,
	42



<u>Lyle v. Superior Court,</u> 122 Cal.App.3d 470, 174 Cal. Rptr. 918 (1981) .....	56
<u>Matter of Yagman,</u> 796 F.2d 1165 (9th Cir. 1986) as amended 803 F.2d 1085 .....	57, 58
<u>McCoy v. Court of Appeals of Wisconsin,</u> 486 U.S. 429, 108 S.Ct. 1895, 100 L.Ed.2d 440 (1988) .....	17 43, 44, 45, 46
<u>Nations v. United States,</u> 14 F.2d 507 (8th Cir. 1926) ....	36, 50
<u>Nix v. Whiteside,</u> 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986) .....	18, 43, 44, 45, 46
<u>Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.,</u> 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) .....	23
<u>Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.,</u> 725 F.2d 537 (9th Cir. 1984) ....	23, 34
<u>Peacock Records, Inc. v. Checker Records, Inc.,</u> 430 F.2d 85 (7th Cir. 1970) .....	38



<u>Rex Oil, Ltd., v. M/V Jacinth,</u> 873 F.2d 82 (5th Cir. 1989) .....	16
<u>Scola v. Boat Frances R., Inc.,</u> 618 F.2d 147 (1st Cir. 1980) .....	55
<u>Societe International Pour Participations Industrielles et Commerciales v. Rogers,</u> 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d (1958) .....	59
<u>Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct.,</u> 107 S.Ct. 2542, 96 L.Ed. 461 (1987) .....	15
<u>Tom Grownay Equip. v. Shelley Irrig. Devel.,</u> 834 F.2d 833 (9th Cir. 1987) .....	57
	58
<u>Trust Corp. of Montana v. Piper Aircraft Corp.,</u> 701 F.2d 85 (9th Cir. 1983) .....	57
<u>U.S. v. Azhocar,</u> 581 F.2D 735 (9th ICr. 1978) .....	38
<u>U.S. v. Blodgett,</u> 709 F.2d 608 (9th Cir. 1983) .....	52
<u>U.S. v. Grinnell Corp.,</u> 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966) .....	38
<u>U.S. v. Raddatz,</u> 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980) .....	26
	27
<u>U.S. v. Sibla,</u> 624 F.2d 864 (9th Cir. 1980) .....	37
	38



<u>U.S. v. Zagari,</u>	
419 F. Supp. 494	
(N.D. Cal. 1976) .....	39
<u>Wilver v. Fisher,</u>	
387 F.2d 66 (10th Cir. 1967) ....	25

#### STATUTES

U.S. Const. Art. III .....	3, 22, 30
U.S. Const. amend. V .....	3
U.S. Const. amend. XIV §1 .....	3
17 U.S.C. §501 et seq. .....	9
28 U.S.C. §144 .....	3, 10, 36, 39
28 U.S.C. §455 .....	3, 39, 40, 41
28 U.S.C. §631 .....	3, 23, 27
28 U.S.C. §634 .....	3
28 U.S.C. §636 .....	3, 24, 26
28 U.S.C. §1254 .....	3



28 U.S.C. §1927 .....	3, 20, 52
Fed. R.App. P. 38 .....	20
Fed. R.App. P. 40 .....	21
Fed. R. Civ. P. 11 .....	3, 13, 57, 62
Fed. R. Civ. P. 26(g) .....	3, 9, 49
Fed. R. Civ. P. 53 .....	22, 23, 24, 40
Fed. R.Civ. P. 59(e) .....	55, 60
Fed. R.Civ. P. 60(a) .....	55
Central District Local Rule 8.3 .....	49
Central District Local Rule 25.10 ....	3, 22, 28

#### TREATISES

<u>5A Moore's Federal Practice,</u> para. 53.04[1] .....	24,
<u>6A Moore's Federal Practice,</u> para. 59.13[4] .....	55



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

LEWIS & COMPANY, LAWYERS, ET AL.,

Petitioners

vs.

KONSTANTIN THOEREN, ET AL.,

Respondents

\*\*\*\*\*

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

\*\*\*\*\*

Petitioners L. Burke Lewis, Amy J.

Cassedy, and Lewis & Company, Lawyers  
(collectively "LEWIS & COMPANY") respect-  
fully request that a writ of certiorari  
issue to review the judgment and opinion  
of the U.S. Court of Appeals for the Ninth  
Circuit entered Monday, September 10, 1990  
and for which petitioners' petition for  
rehearing and suggestion for hearing en  
banc, filed Monday, September 24, 1990,  
was denied as untimely by order dated



November 16, 1990.

**OPINIONS BELOW**

The opinion of the U.S. Court of Appeals for the Ninth Circuit is reported at 913 F.2d 1406 (9th Cir. 1990), and is reprinted in the appendix hereto ("App.") at App. I. That opinion considered certain orders and opinions of the U.S. District Court for the Central District of California. Those orders and opinions are unreported and are reprinted in the appendix hereto. Additionally, the Ninth Circuit issued an order dated November 16, 1990 denying as purportedly untimely LEWIS & COMPANY's petition for rehearing and suggestion for hearing en banc. Such order is unreported and is reprinted in the appendix hereto. Also at issue are certain unreported orders of the Ninth Circuit dated August 29, 1989, January 30, 1990, March 2, 1990, April 2, 1990, April 9, 1990, and May 16, 1990. Such orders are reprinted in the appendix.



### JURISDICTION

The opinion of the U.S. Court of Appeals for the Ninth Circuit was entered on September 10, 1990. On September 24, 1990, LEWIS & COMPANY and other appellants timely and separately filed petitions for rehearing; however, the Ninth Circuit deemed such petitions untimely by order dated November 16, 1990. See discussion, infra. This court's jurisdiction is invoked under 28 U.S.C. §1254.

### CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional provisions, statutes, and rules involved in the case include: U.S. Const. Art. III §1; U.S. Const. amend. V; U.S. Const. amend. XIV §1; 28 U.S.C. §144; 28 U.S.C. §455; 28 U.S.C. §631; 28 U.S.C. §634; 28 U.S.C. §636; 28 U.S.C. §1927; Fed. R.App. P. 38; Fed. R.Civ. P. 11; Fed. R.Civ. P. 26(g); Fed. R.Civ. P. 53; and Central District Local Rule 25.10. Because of the length of such provisions, their pertinent text is set



forth in the appendix hereto.

### STATEMENT OF THE CASE

#### A. The Crux of this Case

While the questions presented by this petition are as set forth above, this is in fact the court of last resort: careers and lives are at stake. The real issue here is corruption in the largest federal judicial district in the United States and its Chief Judge, and likewise the insidious attempts by the Ninth Circuit to cover up that corruption. It is not often, and, it is hoped, it has never happened before, that a published opinion of a U.S. Court of Appeals would have 75 misrepresentations of facts, basic law, and the record.<sup>1</sup> That opinion would have the members of this court and the public believe that petitioners are incompetent

---

<sup>1</sup> The nature and space limitations of this petition prevent a full listing of each of the 75 or more misrepresentations; during full briefing, LEWIS & COMPANY can and will, provide such a listing.



lawyers who failed to follow the instructions, rules, and orders of the district court or the Ninth Circuit. Nowhere, however, does the Ninth Circuit's opinion, couched in conclusory language, specify any purported misconduct by petitioners; nowhere was there even a motion in the district court which specified purported misconduct. The purpose of such intellectual dishonesty is to undermine petitioners' credibility in bringing to public attention the uncontested facts evidencing the corrupt practice in the Central District of California.<sup>2</sup>

The corrupt practice about which petitioners complain and for which they have been made to suffer such devastating consequences is one where the Hon. Manuel L. Real, Chief Judge of the Central District of California, has for the last

---

<sup>2</sup> The decision reads as if the court did not read the opening briefs. Petitioners have attached those opening briefs in their original form as a supplemental appendix.



13 years appointed his long-time friend, John Francis Carroll, outside the confines of the U.S. Constitution, statute, or federal rules, to serve as a surrogate judicial officer, exercising Judge Real's federal judicial authority, for which litigants are made to pay Mr. Carroll's salary, on pain of contempt, at the annual rate of approximately \$750,000, including compensation for Mr. Carroll's support staff and associate/daughter. Through this practice, approximately \$10 million has changed hands, although neither Judge Real nor Mr. Carroll will formally disclose the extent of the practice; record-keeping practices of the courthouse render irretrievable such information.

Petitioners' complaints do not exist in a vacuum: the FBI has commenced an investigation at the request of a federal appellate judge to the very highest levels of that agency. That investigation is



ongoing, although there already appears to have been one homicide resulting from attempts by lawyers to expose corruption in federal courthouses in California.<sup>3</sup>

Since petitioners have raised, their professional and personal lives have been shattered: it is not enough their own physical safety has been put in jeopardy, but the causes of their clients, unrelated to this case, where the law is clearly in their favor, have suddenly been decided adverse to them, notwithstanding prior preliminary orders in their favor.<sup>4</sup>

---

<sup>3</sup> At least one FBI agent, as well as police Capt. Steve Willis, in charge of the homicide investigation, stated off the record to counsel that corruption in federal courthouses in California is systemic and pervasive.

<sup>4</sup> But one example of at least half a dozen, in an entirely unrelated case in state court in which LEWIS & COMPANY represents clients entirely unrelated to Adriana and the third party defendants, opposing counsel presented documents filed with the Ninth Circuit relative to the issue of substitution of counsel to a Los Angeles Superior Court Judge who, in open court, stated (a) that Mr. Lewis (who was not then present and had never before appeared before that judge), was the "kind of lawyer" who had a "propensity" to seek the disqualifi-



This court and the Chief Justice are the ultimate custodians of integrity of the U.S. courts. If this court does not act now, at least two careers are over -- of lawyers who have acted competently, with courage and with dignity. In their stead will remain a federal judge who believes his office is personal to him, to be sold or bartered for benefit of friends, and other judges, who, for whatever reason, are protecting such judge and his corrupt practice.

**B. Facts and Procedural History Below**

This action involved a corporate dispute between Adriana International Corporation ("Adriana"), formed to produce

---

cation of judges, and (b) that LEWIS & COMPANY lacked "credibility" and committed an unethical act in this action by disclosing to the Ninth Circuit the fact of Adriana's attempt to perpetuate false testimony, notwithstanding counsel's obligations mandated by this court. See discussion, infra. The state court, based upon an adverse determination of LEWIS & COMPANY's credibility, ruled against LEWIS & COMPANY's unrelated clients on an outcome determinative issue.

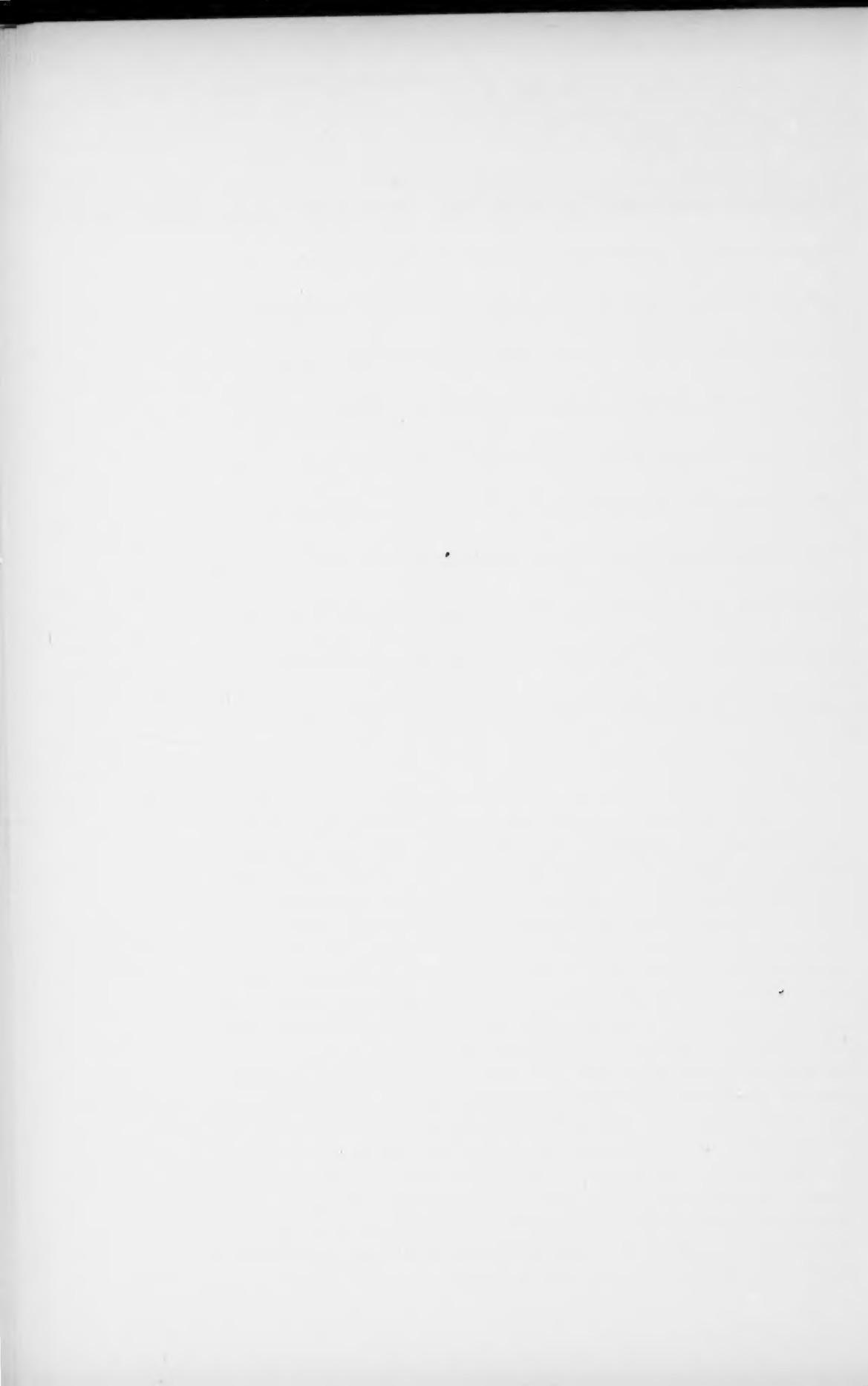


and distribute motion pictures, and its related parties on the one hand and Konstantin Thoeren, Adriana's first president, and his wholly owned companies (collectively "Thoeren"), on the other.

What should have been a relatively simple corporate dispute<sup>5</sup> became procedurally complex and constitutionally threatening when the assigned trial judge, the Hon. Manuel L. Real, inter alia: (a) enforced, *sua sponte*, with no motion pending, and on approximately one hour's

---

<sup>5</sup> The underlying complaint, filed by LEWIS & COMPANY on behalf of Adriana, following an audit of Adriana's books and records performed at the request of LEWIS & COMPANY, alleged that Thoeren had breached contractual and fiduciary duties. The complaint set forth a claim for copyright infringement pursuant to 17 U.S.C. §501 et seq., providing the district court subject matter jurisdiction pursuant to 28 U.S.C. §1331. Thoeren filed a counterclaim against Adriana, naming as third party defendants Kemal Zeinal-Zade ("Zade"), as financier of Adriana, Hans-A. Kunz ("Kunz"), a business partner of Zade, Anthony M. Midgen ("Midgen"), British solicitor to Zade, Kunz, and Adriana, and Arian Films Productions, Ltd., ("AFP"), shareholder of Adriana. LEWIS & COMPANY represented Adriana and the third party defendants.



notice, an unsigned discovery request by Thoeren directed to Adriana, contrary to the express provisions of Fed. R.Civ. P. 26(g), and (b) appointed John Francis Carroll, a local lawyer and long-time friend, as denominated "master", under the purported authority of a local rule, to oversee and make evidentiary rulings "without motion", and to be paid by the litigants at the annual rate of approximately \$750,000, including compensation for secretaries, paralegals, and Mr. Carroll's associate/daughter.

When, at the direction of Judge Real, Mr. Carroll made an unsolicited, ex parte, and extrajudicial overture to LEWIS & COMPANY, Adriana, through LEWIS & COMPANY, moved for Judge Real's recusal pursuant to 28 U.S.C. §144 and to vacate the reference to the "master". Both such motions were denied; a petition for writ of mandamus to the Ninth Circuit was unsuccessful.

As a result of a series of actions by



Mr. Carroll, largely without benefit of a record and based upon ex parte and extra-judicial communications between Judge Real and Mr. Carroll, Judge Real, sua sponte, ordered Kunz and Zade, both Swiss nationals, to appear at a specified date and time for deposition. An emergency request for stay to the Ninth Circuit was unsuccessful. Neither Kunz nor Zade appeared.

Kunz subsequently presented declaration testimony that he was unable to appear at the ordered date and time because he was to meet with officials of certain African governments. Zade presented declaration testimony he was unable for health reasons to travel to the United States to appear at the ordered date and time.

Nonetheless, the district court not only struck the answers of Kunz and Zade, but also struck the answers of Midgen and Adriana, dismissed Adriana's complaint, and entered default against Adriana and



each third party defendant. Following a hearing at which Adriana and the third party defendants were not permitted to present evidence, and over objections that the district court had no subject matter jurisdiction over the third party complaint, the district court entered default judgment against Adriana, Zade and Kunz for approximately \$8 million, as well as ordering 30% of Adriana's stock transferred to Thoeren. The judgment was amended, without notice or opportunity to be heard, to include Midgen in the multi-million dollar judgment, to order AFP to turn over 30% of both its stock and Adriana's stock, and to award an additional \$30,000 damages against Zade. Adriana and the third party defendants moved for reconsideration of that amendment to the judgment; the district court imposed sanctions against LEWIS & COMPANY, Adriana and the third party defendants for so moving.



Additionally, the district court, early in the proceedings, imposed sanctions against LEWIS & COMPANY and Adriana (a) for moving to disqualify counsel for Thoeren on the basis of evidence that such counsel had previously acted as counsel for Adriana on a subject of controversy in the instant litigation, (b) for unspecified "discovery" conduct, and (c) for refusing to sign, pursuant to Fed. R.Civ. P. 11, a joint document required by local rule, prepared by counsel for Thoeren, and containing false and prejudicial statements. The district court held LEWIS & COMPANY in contempt for the purported failure to pay such sanctions "forthwith", although (a) Thoeren delayed preparation of proposed written orders, as directed by the district court, (b) Thoeren sought to enforce the orders before they were final, (c) Mr. Lewis was, at the time, in the hospital and/or recovering from surgery, CR 65, (d) the sanctions were in fact paid



by Adriana and (e) no motion for contempt was at any time pending because of Thoeren's failure to comply with local filing requirements.

A timely notice of appeal to the U.S. Court of Appeals for the Ninth Circuit was filed; LEWIS & COMPANY prepared and filed opening briefs on behalf of Adriana, Zade, Kunz, Midgen, AFP, and LEWIS & COMPANY with the specific, page-by-page, line-by-line approval of and following months of regular and detailed discussions with the individual appellants (including Midgen, a solicitor), and a local Adriana officer. By order dated August 29, 1989, App. XI, the Ninth Circuit rejected a motion by Thoeren to strike the opening briefs based upon, inter alia, objections to the spacing and format of such briefs.

During or about August and September, 1989, subsequent to the filing of the opening briefs, despite significant pre-filing investigation and exhaustive prepa-



ration during the district court and appellate proceedings, LEWIS & COMPANY learned or came to believe (a) the declaration submitted by Kunz to excuse his failure to appear for deposition was almost certainly false,<sup>6</sup> (b) Zade's testimony as to his ill health to excuse his nonappearance for deposition was likewise extremely suspect, (c) allegations in the third party complaint relative to Zade's actual control of the other individual and corporate parties, despite prior denials, were true and correct, and (d) allegations central to the complaint were and are unfounded.

Although until the time of LEWIS & COMPANY's discovery of the false testimony, sham issues and sham pleadings, none of Adriana or the third party defendants

---

<sup>6</sup> Thus rendering sham an argument relative to the sovereignty of nations as justification for his nonappearance for deposition, see Societe Nationale Industrielle Aerospatiale v. U.S. District Court, S.D. Iowa, 107 S.Ct. 2542, 96 L.Ed.2d 461 (1987).



had expressed anything other than satisfaction with LEWIS & COMPANY's services,<sup>7</sup> when it became apparent that LEWIS & COMPANY intended to disclose to the Ninth Circuit the fact of such false testimony, sham issues and sham pleadings, Adriana and the third party defendants, with only the reply briefs remaining to be filed in less than two weeks, (a) moved to substitute new counsel and (b) offered LEWIS & COMPANY an immediate \$103,000 payment for LEWIS & COMPANY's legal services in this case only<sup>8</sup> and conditioned

---

<sup>7</sup> Even after the entry of default by the district court, Adriana and the third party defendants and/or their related business interests requested LEWIS & COMPANY to serve as sole, lead counsel, or as co-counsel, in multiple matters of business litigation in at least five different states or jurisdictions around the country, as well as in Europe, including Rex Oil, Ltd., v. M/V Jacinth, 873 F.2d 82 (5th Cir. 1989), cert. denied, \_\_\_ U.S.\_\_\_, 110 S.Ct. \_\_\_\_ (1990).

<sup>8</sup> Adriana and/or related business interests renounced fee obligations for legal services in all other matters in which LEWIS & COMPANY was providing representation, and had failed to meet fee obligations to other counsel in such other cases.



payment on LEWIS & COMPANY's immediate substitution out of the case. The only reasonable interpretation of the timing of that offer was that it was a thinly-disguised attempt to buy LEWIS & COMPANY's silence. LEWIS & COMPANY rejected the offer and filed an opposition to the motion for substitution which disclosed, in a manner so as not to breach any attorney-client privileges, the fact of the false testimony, sham issues and sham pleadings, consistent with the obligations of counsel under McCoy v. Court of Appeals of Wisconsin, 486 U.S. 429, 108 S.Ct. 1895, 100 L.Ed.2d 440 (1988)<sup>9</sup> and Nix v.

---

<sup>9</sup> "Although trial counsel may remain silent and force the prosecutor to prove every element of the offense, counsel for an appellant cannot serve the client's interest without asserting specific grounds for reversal. In so doing, however, the lawyer may not ignore his or her professional obligations. Neither paid nor appointed counsel may deliberately mislead the court with respect to either the facts or the law .... "

McCoy, 108 S.Ct. at 1900.



Whiteside, 475 U.S. 157, 166, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986).<sup>10</sup>

A total of eleven briefs were filed in connection with the motion for substitution; the issue was pending for seven months. See App. XII-XVII. Yet, startlingly, in all that time, neither new counsel for Adriana and the third party defendants nor any judge of the Ninth Circuit hearing the issue sought the basis for LEWIS & COMPANY's assertions as to the false testimony, sham issues, and sham pleadings. (While new counsel for Adriana and the third party defendants responded in each of four briefs to LEWIS & COMPANY's disclosures with unsupported vitriol, the reply brief ultimately filed

---

<sup>10</sup> "No client, corporate or individual, however powerful ... is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law ... or disrespect of the judicial office ... He must observe and advise his client to observe the statute law." Nix, 475 U.S. at 166, 106 S.Ct. at 994.



by such counsel on behalf of Adriana and the third party defendants implicitly or explicitly conceded the truth of LEWIS & COMPANY's disclosures.) Instead, new counsel for Adriana and the third party defendants concocted a rationale to justify the substitution that despite the prior specific approval by Adriana and the third party defendants of the opening briefs, the most significant issues and where the material facts are undisputed, i.e., the requested recusal of Judge Real and the constitutional challenge to the appointment of Mr. Carroll as a denominated "master", were "offensive", "obnoxious and an affront to the court."

Following oral argument, see n.19, infra, the court issued an opinion dated September 10, 1990 which (a) affirmed all rulings of the district court with the exception of a ruling on damages for emotional distress and (b) imposed sanctions against LEWIS & COMPANY and Adriana



pursuant to Fed. R.App. 38, for filing opening briefs deemed "frivolous" on the basis that the arguments raised were "rehashings of the facts and present hardly any legal analysis". App. I at 37. Further, the court held it would award damages pursuant to 28 U.S.C. §1927 as a result of the opening briefs purportedly using "one-and-one half line spacing."

LEWIS & COMPANY timely filed a petition for rehearing and suggestion for hearing en banc by personally delivering on September 24, 1990 such document to the office of clerk of the U.S. District Court of the Northern District of California in San Francisco, California, pursuant to the specific instructions of a deputy clerk of the Ninth Circuit and specific representations that such clerk would personally insure that the document would be marked as received and filed on September 24, 1990, i.e., timely pursuant to Fed. R.App.

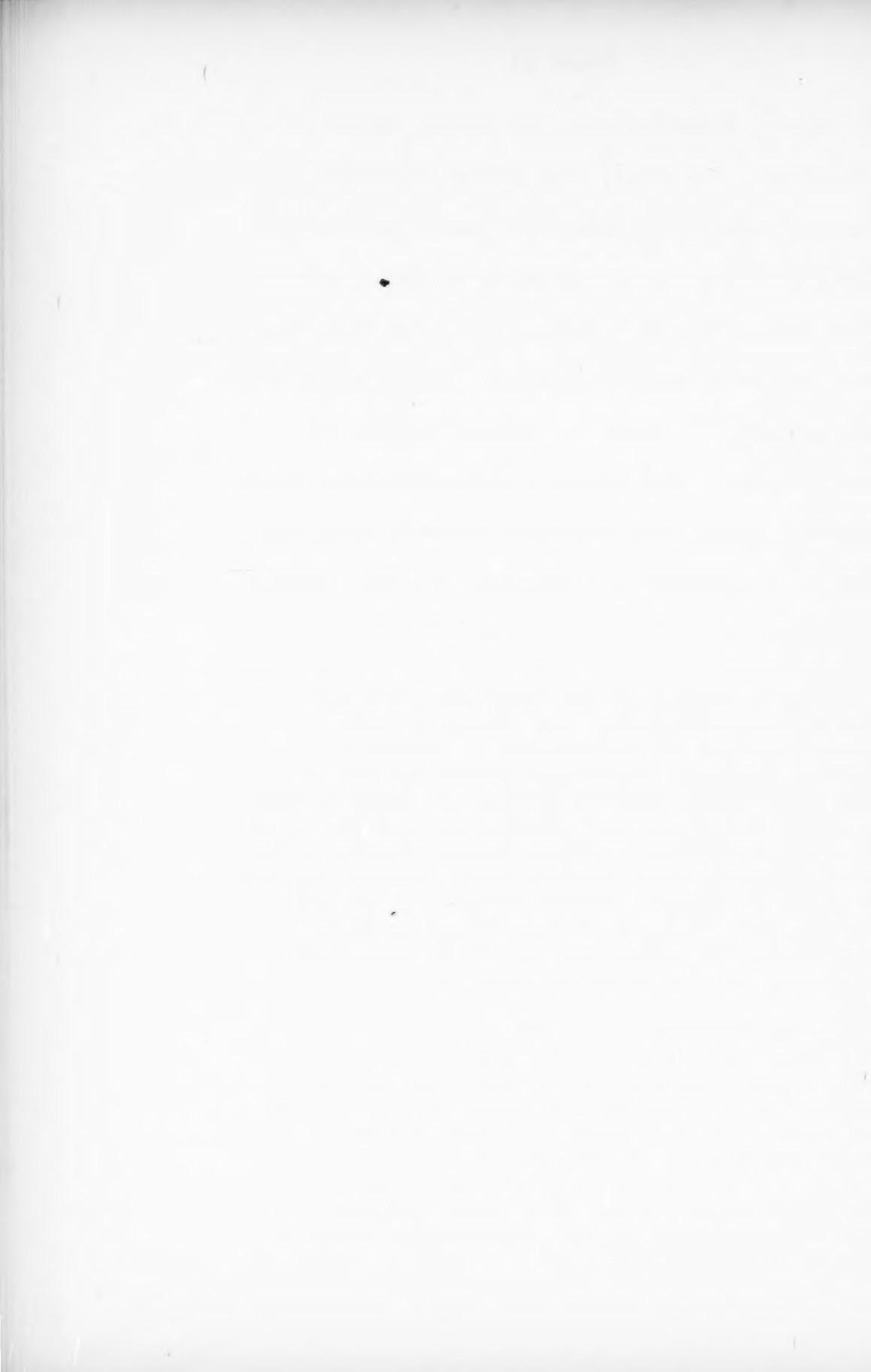


P. 40.<sup>11</sup> Nonetheless, by order dated November 16, 1990, the Ninth Circuit deemed LEWIS & COMPANY's petition "untimely", inaccurately suggesting the petition for rehearing and suggestion for hearing en banc was mailed, rather than personally delivered.<sup>12</sup> Also by the November 16, 1990 order, the court fixed attorney fees, double costs and damages jointly against LEWIS & COMPANY and Adriana in the amount

---

<sup>11</sup> As a result of the October, 1989 San Francisco earthquake, the Ninth Circuit presently has no facilities to accept in-person filings; the court relies on the local district court clerk's office to receive hand-carried documents for processing and filing by the Ninth Circuit. Other deputy clerks of the Ninth Circuit have stated that, because of the lack of a regular intake window, it is the policy and practice of the court to mark petitions for rehearing as filed based upon the date of the proof of service.

<sup>12</sup> The November 16, 1990 order also held a petition for rehearing by Adriana and the third party defendants untimely on the same basis. A further motion/petition for relief by such parties states that new counsel likewise personally delivered the petition for rehearing to the clerk's office at the U.S. District Court in San Francisco, pursuant to the instructions of the same deputy clerk at the Ninth Circuit.



of \$73,101.00.

**REASONS WHY CERTIORARI SHOULD BE GRANTED**

**I. THE APPOINTMENT OF THE "MASTER" IS  
UNCONSTITUTIONAL AND CONTRARY TO STATUTE**

Mr. Carroll's appointment as "master" runs inherently contrary to Article III and the due process clauses of the U.S. Constitution, and is contrary to statute and the Federal Rules of Civil Procedure for the following reasons:<sup>13</sup>

First, the appointment was not to a "special master" pursuant to Fed. R.Civ. P. 53, but was instead to a Local Rule 25.10 "master". The difference is more than that of semantics. The 1983 amendments to Fed. R.Civ. P. 53, in the context

---

<sup>13</sup> LEWIS & COMPANY has standing to challenge the appointment of Mr. Carroll (a) under Kordich v. Marine Clerks Ass'n, 715 F.2d 1392 (9th Cir. 1983), where counsel is deemed the equivalent of a party for purposes of appeal, and (b) because both the district court and the Ninth Circuit premised the dismissal of the complaint and entry of default on discovery "rulings" by Mr. Carroll which were in turn premised on purported, but unspecified "conduct" by LEWIS & COMPANY.



of the Magistrates Act of 1978, 28 U.S.C. §631, et seq., makes plain that judicial, as opposed to fact-finding functions, of special masters have been removed.<sup>14</sup> In the context of Fed. R.Civ. P. 53, the appointment of private attorneys to serve in an ad hoc, judicial capacity is inconsistent with contemporary notions of Article III and due process requirements.

Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., 725 F.2d 537, 544 (9th Cir. 1984); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). Here, however, Mr. Carroll was appointed for the purely judicial function

---

<sup>14</sup> The Advisory Committee Notes to the 1983 amendments state the term "Special Master" was retained "in order to maintain conformity with 28 U.S.C. §636(b)(2), authorizing a judge to designate a magistrate to serve as a special master ...." The Advisory Committee further remarked, "[a]lthough the existence may make the appointment of outside masters unnecessary in many instances ... such masters may prove useful when some special is desired or when a magistrate [is] unavailable for length and detailed supervision of a case."



of ruling on discovery and evidentiary matters "without motion".

Further, Mr. Carroll's compensation, at the rate of \$235 per hour (in 1987) plus secretarial, paralegal, and associate time, was guaranteed by Judge Real's contempt authority, a result expressly prohibited by Fed. R.Civ. P. 53, which allows a special master to collect his fees only by writ of execution. 5A Moore's Federal Practice, para. 53.04[1] at 53-32.

Moreover, no showing of "exceptional circumstances", required by Fed. R.Civ. P. 53, was made here; rather, the stated reason for the appointment, "to insure the cooperation of counsel and the expeditious completion of discovery", would make references the rule, rather than the exception. Such a result squarely contradicts the holdings of this court and other circuits. For example, in LaBuy v. Howes Leather Co., 352 U.S. 249, 77 S.Ct. 309,



1 L.Ed.2d 290 (1957), this court found that the reference to a master in circumstances not shown to be exceptional "amounts to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation."

Id., 352 U.S. at 256, 77 S.Ct. at 313.<sup>15</sup>

Second, the appointment is not a reference to a full- or part-time U.S. Magistrate within the procedures and standards prescribed by the Magistrates Act, and lacks legislative limits of

---

<sup>15</sup> The Tenth Circuit specifically rejected the appointment of a special master to supervise interrogatory answers, holding:

"The court has control over and responsibility for the discovery procedures authorized by the rules. The order of reference here borders on an abdication of judicial function and is not justified by the record."

Wilver v. Fisher, 387 F.2d 66, 69 (10th Cir. 1967). Likewise, in Apex Fountain Sales, Inc. v. Kleinfeld, 818 F.2d 1089 (3d Cir. 1987), the Third Circuit rejected the reference of a contempt motion involving "relatively simple questions of fact and law" as "offending Rule 53". Id., 818 F.2d at 1096-97.

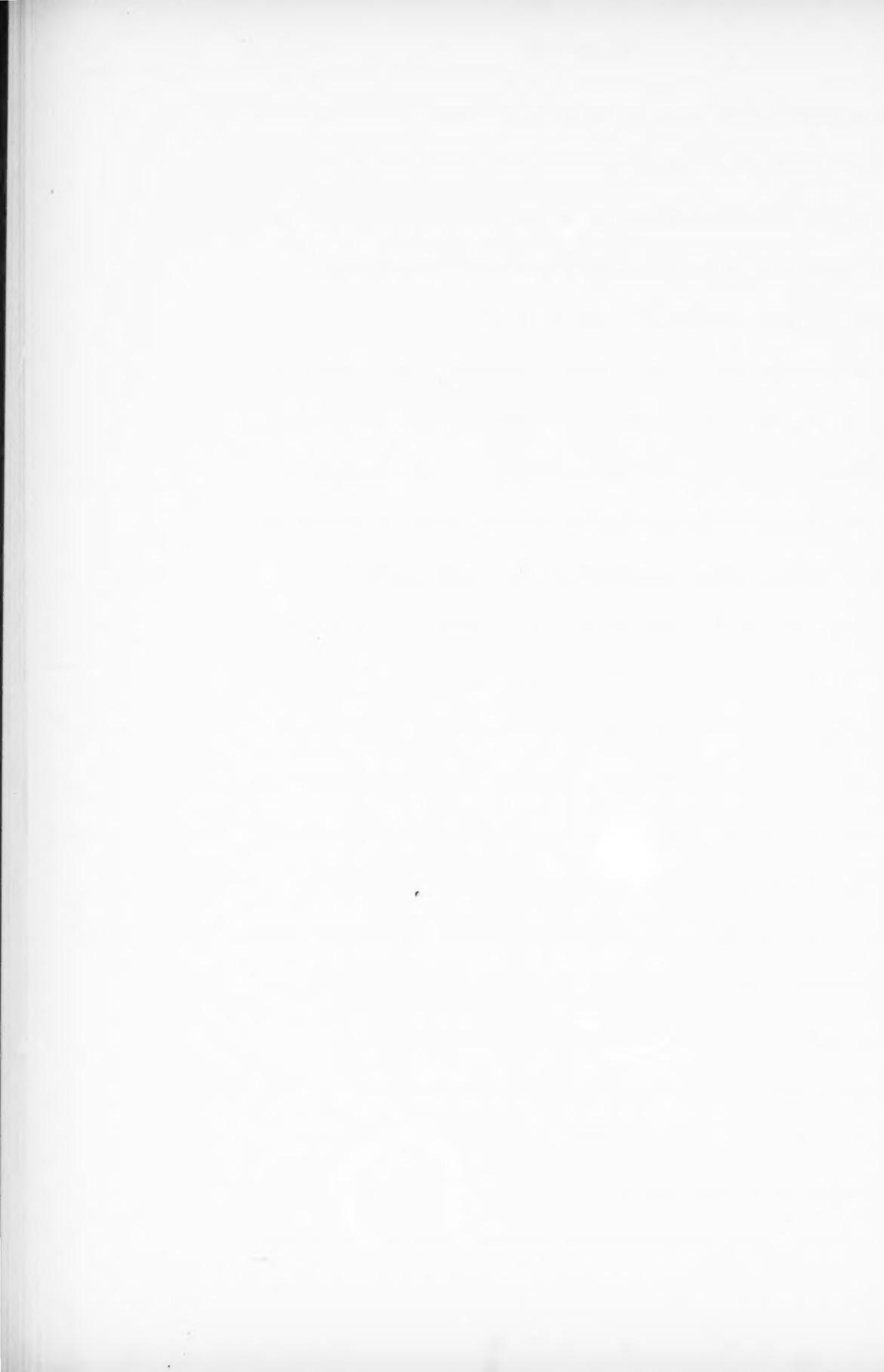


compensation and constitutional limits of impeachment. Specifically, the Magistrates Act permits magistrates to hear and determine pretrial matters, including discovery matters, 28 U.S.C.

§636(b)(1)(A), or, upon proper designation by a district judge, to serve as a special master, 28 U.S.C. §636(b)(2), or to perform such additional duties, not inconsistent with the constitution and federal laws, as are assigned by district judges.

28 U.S.C. §636(b)(3). See U.S. v.

Raddatz, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980). Thus, magisterial functions of hearing discovery matters and acting as a special master are mutually exclusive and a non-magistrate may not perform the judicial function of overseeing discovery. Magistrates are appointed or removed by concurrence of a majority of the judges of the district courts and pursuant to standards set by statute and procedures promulgated by the



Judicial Conference. 28 U.S.C. §631; Ruddatz, 447 U.S. at 685, 100 S.Ct. at 2417 (Blackmun, J., concurring). Part-time magistrates who do not meet the statutory standards of 28 U.S.C. §631 may be appointed only certification by the appointing courts that no qualified individual is available in the district. 28 U.S.C. §631(b), (c). Tenure is fixed by statute, 28 U.S.C. §631(e); the compensation of magistrates, part- and full-time, is circumscribed to a portion of that of district judges.

Here, by contrast, although performing the duties of a magistrate and more, Mr. Carroll is appointed at the whim of a single judge, without set standards, other than an existent relationship between him and Judge Real. Further, the parties are made to pay Mr. Carroll's uncircumscribed, approximately \$750,000 annual salary. Query: is there some reason, other than \$750,000 annual compen-



sation for Mr. Carroll to be a "master", rather than a part-time magistrate? See discussion infra, re: disqualification.

Third, the appointment is not governed by any established procedures for hearing and review by an Article III judge. Neither Local Rule 25.10 nor the appointing order prescribes any procedures by which the "master" is to hear and determine discovery matters, much less any procedures for review. Indeed, the appointing order, by providing for discovery matters to be resolved "without motion", as well as the manner in which proceedings before Mr. Carroll were generally conducted, i.e., by letter or telephone, there was not even opportunity to make a record for district court or appellate review.<sup>16</sup>

---

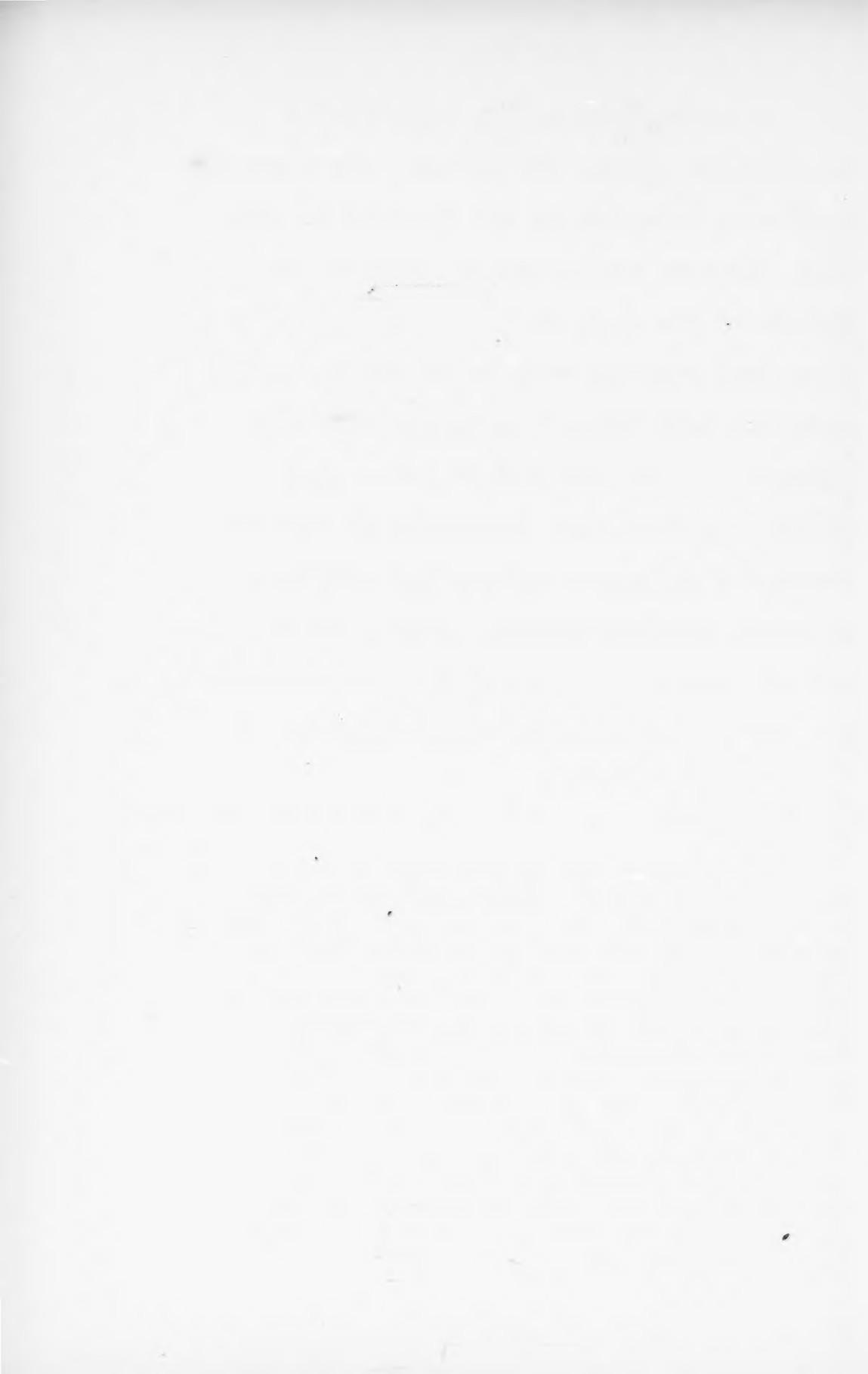
<sup>16</sup> LEWIS & COMPANY requested telephone "hearings" before Mr. Carroll be transcribed or tape-recorded. Exh. "25" to CR 121. While Mr. Carroll represented that some of the conversations were tape-recorded, those tapes were at no time made available for district court or appellate review.



Instead, information relative to proceedings before Mr. Carroll was communicated informally by Mr. Carroll to Judge Real, without the presence, objections, or briefs of the parties.<sup>17</sup> In this context, Mr. Carroll made an ex parte, extra-judicial settlement overture to LEWIS & COMPANY -- coercive and on terms that could only have been favorable to Thoeren, because a purported motion for contempt was then pending against LEWIS & COMPANY and Adriana -- on the representations (a) Mr. Carroll was vested with authority by

---

<sup>17</sup> For example: (a) in the face of Midgen's invocation of the attorney-client privilege during deposition, Mr. Carroll announced that he would "seek the advice" of Judge Real as to how to proceed. Tr. 6/24/87, Exh. "25" to CR 124 at 147:1-17; (b) during the hearing on Adriana's motion to vacate the reference, Judge Real concluded, without benefit of a motion or other record, that LEWIS & COMPANY was "stonewalling" on discovery, RT 8/10/87 at 29:13-30:2; and (c) Judge Real was somehow aware, without any order or report by Mr. Carroll, and without any formal motion pending, that Zade and Kunz had been directed in June, 1987 by Mr. Carroll to appear for deposition in July, 1987.



Judge Real to initiate and conduct settlement discussions pursuant to his appointment, (b) review of the pleadings led him and, plainly, Judge Real, to the opinion that discovery costs would exceed the amount at issue in the litigation, and (c) the existence and content of the conversation would not be revealed to Thoeren or his counsel unless all parties agreed to discuss settlement.

The appointment is a simultaneous abdication and expansion of Article III authority: Judge Real conferred on a private citizen the authority of an Article III judicial officer, thus abdicating his own duties; yet at the same time expanded his own authority by creating a rump judiciary in which he performs both executive and legislative functions, i.e., to "nominate and confirm" persons to exercise the authority of a U.S. district judge without an established right of or procedure for Article III review.



Moreover, the appointment carries with it the appearance of financial venality and corruption and is a vehicle by which the district judge sought to implement his biases and preconceived notions for a predetermined result: both Mr. Carroll and Judge Real resisted requests and opportunity for disclosure of prior similar appointments and Mr. Carroll's total compensation. Tr. 5/5/87 at 83:12-84:1, Exh. "D" to CR 62; RT 11:13-12:24. See International Union (UAW) v. N.L.R.B., 459 F.2d 1329, 1336 (D.C. Cir. 1972) ("when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him"). Mr. Carroll did, however, reveal off-the-record that, as of 1987, he had been acting as a denominated special master for the preceding 10 years; it was also apparent that his practice is devoted almost exclusively to such appointments,



such that the total compensation to Mr. Carroll, over the course of the approximately 13 years that this practice has continued, is \$10 million in current cash value, including compensation for his associate/daughter, paralegal, and secretary, monies guaranteed by Judge Real's contempt authority.

Query: can any person, by proxy, exercise the authority of a federal judge if Judge Real so decides? Can the justices of this court assign their authority by proxy? For huge compensation compelled by litigants on pain of contempt? Will this court allow a district judge to suspend the Federal Rules of Civil Procedure? To exercise legislative and executive authority that operates outside the boundaries of Article III, statute, and the federal rules? Will this court tolerate a federal judge engaging in ex parte communications with a party who was facing sanctions and contempt? Making rulings



"without motion" and without a record? To ask these questions is to answer them.

Whether Judge Real has financially benefitted from this 13-year practice is a question open for formal investigation, but the appearance and inferences of such impropriety are plain. See Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988). Such a result is not only intolerable, unconstitutional and unjustified, but is inherently corrupt and corrupting of the court and counsel who "go along" with the practice.

The Ninth Circuit, in an opinion startling for containing no less than 75 significant misstatements and/or misrepresentations of the appellate briefs and/or the court record, principally intended to undermine LEWIS & COMPANY's credibility and to conceal from public view the existence of the long-standing practice by which Judge Real has delegated his

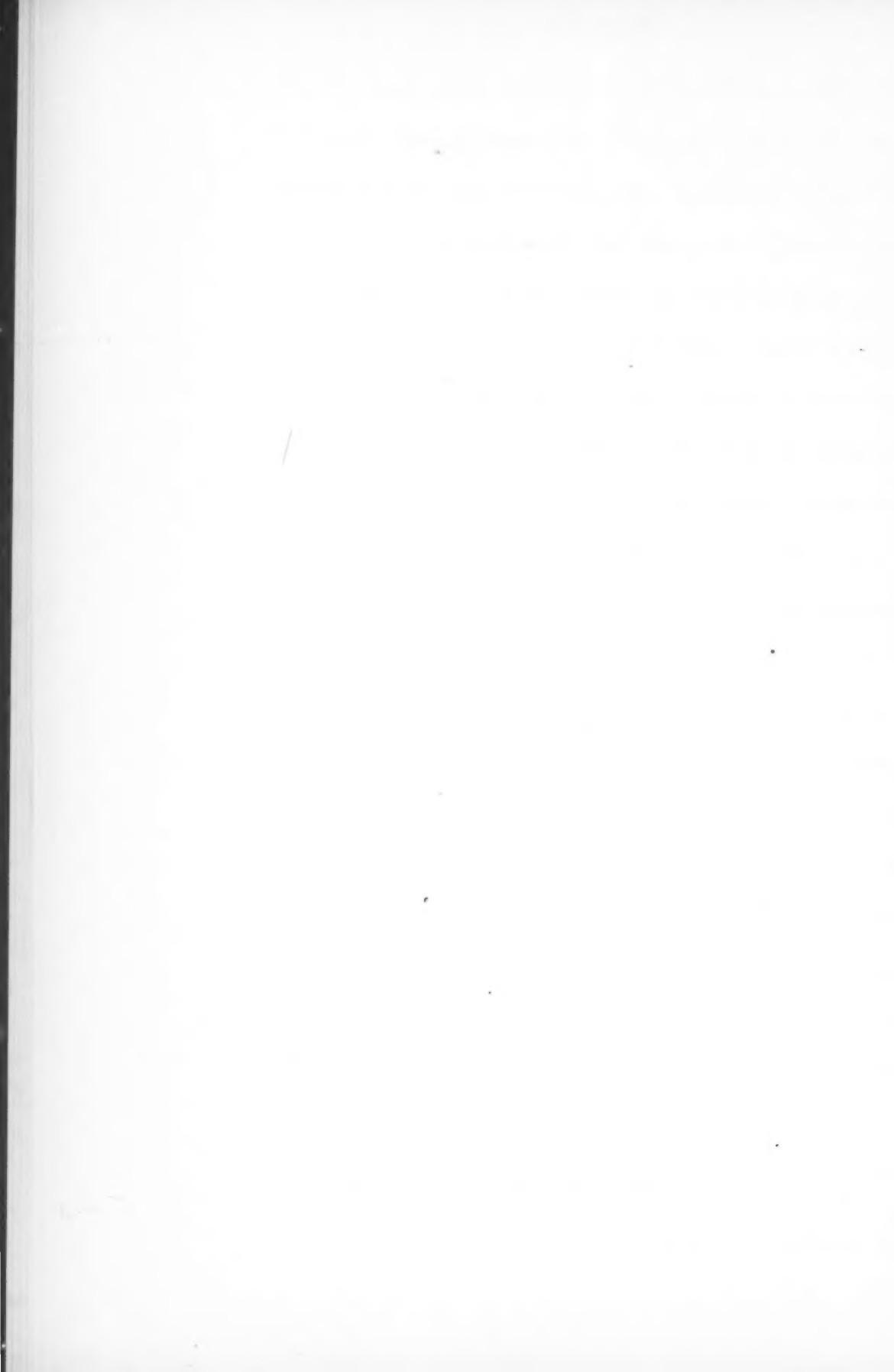


judicial authority and enriched his long-time friend, ignored or overlooked the unconstitutionality, statutory violations, and corrupt nature of the practice.

Specifically, the opinion holds merely that Adriana's objection to Mr. Carroll's appointment was "waived" because Adriana's motion to withdraw the reference was not filed until July 6, 1987, App. I at \_\_\_, failing to address (a) that as the appointment was not under Fed. R.Civ. P. 53 and was without constitutional basis, the issue could not be "waived", Pacemaker Diagnostic Clinic v. Instromedix, 712 F.2d 1305 (9th Cir. 1983); (b) Adriana sought relief from the Ninth Circuit on May 6, 1987 for, among other things, the appointment and conduct of Mr. Carroll, 9th Cir. Civ. Dkt. No. 87-5781;<sup>18</sup> (c) during May, 1987, Mr. Carroll made his ex parte,

---

<sup>18</sup> One judge on the motions panel voted for an interim stay of the entire proceedings in the district court.



extra-judicial settlement overture to LEWIS & COMPANY, and (d) illness and injuries to Mr. Lewis which largely kept him out of the office from December, 1986 through August, 1987, Exhs. "7"--"9" to CR 125.<sup>19</sup>

---

<sup>19</sup> It is difficult to reconcile such a holding with that of Alaniz v. Cal. Processors, 690 F.2d 717 (9th Cir. 1982), in which Judge Alarcon participated, and where the purported authority of a magistrate to act without a "specific, clear and unambiguous expression of consent" was soundly renounced. In a footnote, the court quoted 28 U.S.C. §636(c)(2): "neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent ... [W]e will not permit our jurisdiction to depend on inferences when both the statute and common sense call for precision." Id.

LEWIS & COMPANY brought Alaniz to the panel's attention just prior to oral argument; immediately thereafter, the panel suddenly changed the rules and limited LEWIS & COMPANY to less than 10 minutes of oral argument. The panel cut off LEWIS & COMPANY's argument at the precise moment Alaniz was raised and permitted LEWIS & COMPANY no further participation, although it was plain that LEWIS & COMPANY was the only counsel present with a full grasp of the facts and issues. It is well-known in the Los Angeles legal community that Judges Real and Alarcon are close friends.



## II. THE ASSIGNED TRIAL JUDGE SHOULD HAVE BEEN DISQUALIFIED<sup>20</sup>

28 U.S.C. §144, allowing for the disqualification of a district judge upon the filing of an affidavit by a party, "is plain in its terms and imperative in its construction." Nations v. United States, 14 F.2d 507, 509 (8th Cir. 1926).<sup>21</sup>

---

<sup>20</sup> Under Kordich, 715 F.2d 1392, the Ninth Circuit equates LEWIS & COMPANY with the parties for the purpose of review. Moreover, if Judge Real were disqualified, all orders, including those directed against LEWIS & COMPANY, would be vacated. Accordingly, LEWIS & COMPANY has standing on the issue of Judge Real's requested disqualification pursuant to 28 U.S.C. §144 and 28 U.S.C. §455.

<sup>21</sup> "There is no ambiguity ... nothing to qualify or temper its words or effect ... It permits an affidavit of personal bias or prejudice to be filed and ... if it be accompanied by certificate of counsel, directs an immediate cessation of action by the judge whose bias or prejudice is averred, and in his stead, the designation of another judge. And there is purpose in the conjunction; its elements are complements of each other. The exclusion of one judge is emphasized by the requirement of the designation of another."

Berger v. United States, 255 U.S. 22, 33, 41 S.Ct. 230, 233, 65 L.Ed. 488 (1921).

28 U.S.C. §144 serves a salutary purpose:



An affidavit, to be "legally sufficient", must specifically allege facts "that fairly support the contention that the judge exhibits bias or prejudice directed toward a party that stems from an extrajudicial source." U.S. v. Sibla, 624 F.2d 864, 868 (9th Cir. 1980).

Here, the affidavit filed by Adriana was legally sufficient, alleging: (a) extra-judicial proceedings and bias, (b) that the appointment of Mr. Carroll carried with it the appearance of impropriety, including long-time personal and financial relationships arising therefrom, (c) extra-judicial communications among Judge Real, Mr. Carroll, and counsel. Such allegations squarely met the test that bias and prejudice exhibited by a

---

"[I]ts solicitude is that the tribunals of the country shall not only be impartial ... but shall give assurance that they are impartial, free ... from any 'bias or prejudice' that might disturb the normal course of impartial judgment ...." Berger, 255 U.S. at 35-36, 41 S.Ct. at 234.



judge "stems from from an extrajudicial source." Sibla, 624 F.2d at 868; Peacock Records, Inc. v. Checker Records, Inc., 430 F.2d 85, 89 (7th Cir. 1970) (findings unsupported by the record are evidence that the judge relied on extra-judicial sources).

The Hon. William J. Rea, to whom the motion was assigned,<sup>22</sup> ruled the

---

<sup>22</sup> Contrary to the requirement of Section 144 that "where an affidavit of personal bias or prejudice is filed, the judge must cease to act in the case and proceed to determine the legal sufficiency of the affidavit", Bell v. Chandler, 569 F.2d 556, 559 (10th Cir. 1978), citing Berger, the affidavit was assigned to another district judge, the Hon. William J. Rea, for determination of its legal sufficiency pursuant to a Central District General Order.

Such assignment misreads the statutory provisions. Section 144 applies to "any proceeding" in a district court; upon the presentation of a legally sufficient affidavit, the inquiry ends and the entire case ("proceeding") is reassigned to another judge. Although assignment to another judge of a disqualification motion for determination of the sufficiency of the affidavit has on occasion been permitted, see, e.g., U.S. v. Grinnell Corp., 384 U.S. 563, 582-83 n.13, 86 S.Ct. 1698, 1709-10, n.13, 16 L.Ed.2d 778 (1966), it has been severely criticized. See U.S. v. Azhocar, 581 F.2d 735, 738 (9th Cir. 1978).



affidavit was evidentiarily infirm as having been made on "information and belief", and determined a declaration from Thoeren's counsel, CR 66, because it was purportedly based on personal knowledge, was inherently more credible than the moving affidavit. Such a ruling (a) defies the mandate of 28 U.S.C. §144 that legal sufficiency is to be determined from the four corners of the affidavit alone, Berger, and (b) ignores the requirement of the statute that a party to a proceeding make the required affidavit -- an affidavit by counsel is automatic grounds for denial of the motion, Giebe v. Pence, 431 F.2d 942 (9th Cir. 1970) -- such that affidavits may be made on information and belief. Berger, 255 U.S. at 34, 41 S.Ct. at 233; U.S. v. Zagari, 419 F. Supp. 494, 504 n.29 (N.D. Cal. 1976).

Alternatively, Judge Real should have been disqualified under 28 U.S.C. §455(a) for the appearance of bias or partiality,

}

see RT 3/16/87 at 15:25-16:8, or under 28 U.S.C. §455(b), prohibiting judges from hearing a case in which they have a financial interest. Specifically, the appointment of Mr. Carroll as a denominated "master" smacks of financial interest where a federal judge who, at the time, received an annual salary limited by statute to \$89,500 appoints, in derogation of Article III, the Magistrates Act, and Fed. R.Civ. P. 53, a long-time friend to act as his "deputy" in ruling on and carrying out pretrial orders and whose services are compensated by the parties at an annual rate, including support staff and associate compensation at an annual rate of approximately \$750,000, then refuses to disclose the nature and number of such appointments, gives at least the appearance that Judge Real is receiving some benefit in exchange. That mere appearance is sufficient to require recusal. See Liljeberg, 108 S.Ct. at 2202.



Moreover, it is undisputed that ex parte and extrajudicial communications took place, including, inter alia, Mr. Carroll's ex parte settlement overture to LEWIS & COMPANY based on the representation of his authority from Judge Real -- not set forth in any written document -- to initiate and conduct settlement discussions. Exh. "C" to CR 65. See also n.17, supra.<sup>23</sup>

---

<sup>23</sup> The Ninth Circuit's opinion characterizes LEWIS & COMPANY as having argued that "sanctions were improper because Judge Real should have been disqualified because of ex parte communications with the special master", and that such argument was "not presented in the opening brief". App. I at 34. Such holding not only ignores and/or overlooks actual arguments made in the opening brief of Adriana that Judge Real should have been disqualified for his ex parte and extra-judicial communications with Mr. Carroll and for the appearance of a financial interest, Supp. App., Adr Br., but fails to heed the mandate of Liljeberg, 108 S.Ct. at 2206-07, that all orders from the moment of Mr. Carroll's appointment must be declared void and that the appearances of impropriety can be raised at any time.

The opinion further holds that LEWIS & COMPANY "offers no objective proof" of a "financially beneficial relationship" sufficient for disqualification under 28 U.S.C. §455(a) (the opinion does not address 28 U.S.C. §455(b)). Not only does that holding



### III. THE NINTH CIRCUIT IGNORED COUNSEL'S DUTIES MANDATED BY THIS COURT

The opinion gives short shrift to LEWIS & COMPANY's arguments that the substitution of counsel by Adriana and the third party defendants was done for an improper purpose, noting only that LEWIS & COMPANY was "fired" during the course of the appeal, App. I at 2, and dismissing LEWIS & COMPANY's arguments thereon as "irrelevant". Id. at 32 n.11.

At the crux of this issue, however, is that Adriana and the third party defendants, having learned that LEWIS & COMPANY had discovered, after the submission of the opening briefs herein, of the false testimony, sham issues, and sham pleadings sought to be perpetuated by them, and that

---

misstate Liljeberg, 108 S.Ct. at 202, but overlooks (a) undisputed facts in the record demonstrating the appearance of bias and impropriety and inferences therefrom, see discussion, supra, and (b) the fact of approximately \$10 million changing hands over 13 years.



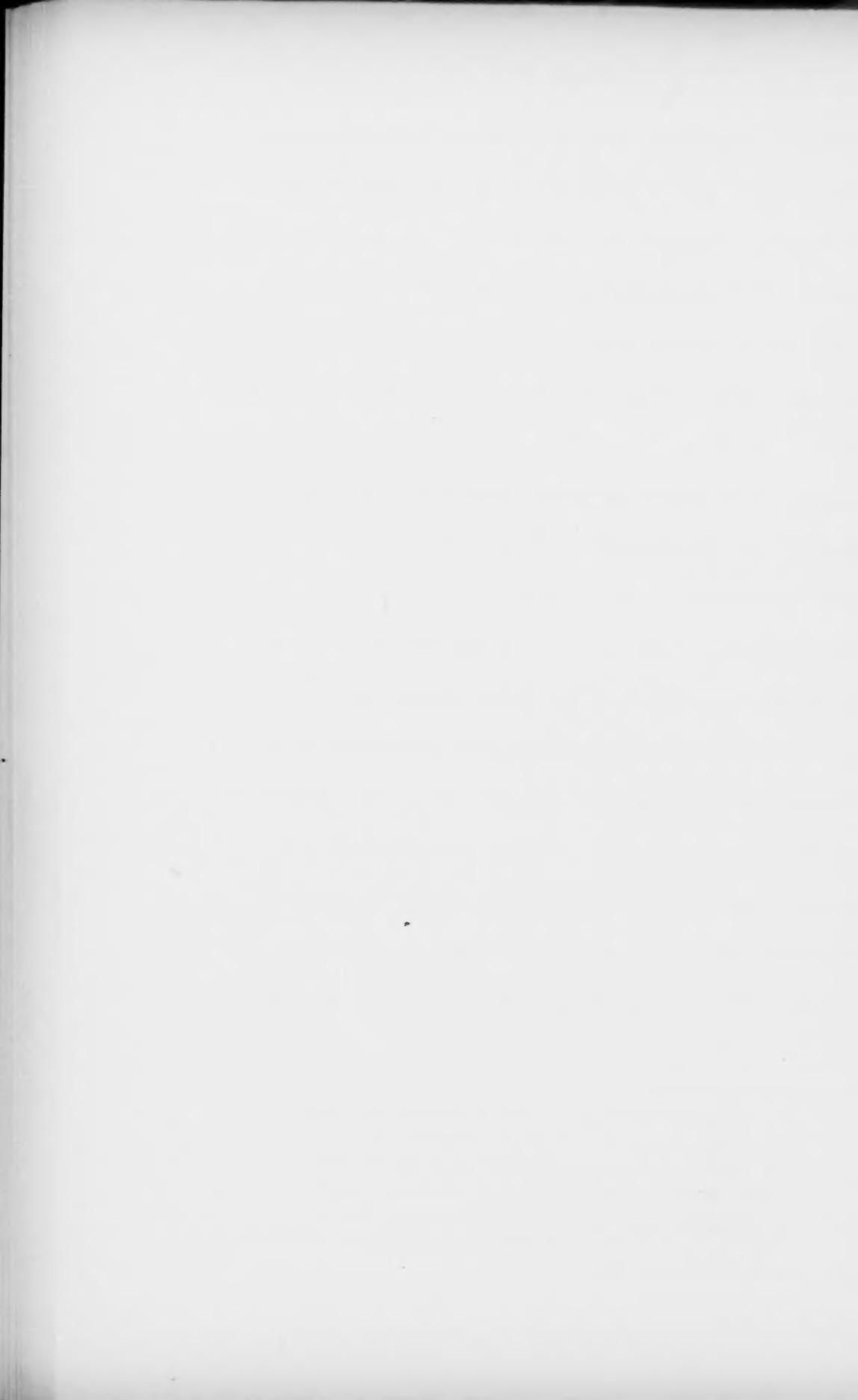
LEWIS & COMPANY was prepared to disclose the fact and nature of same to the Ninth Circuit, sought to use their purported right to substitute counsel for the purpose of preventing those disclosures. See McCoy, 108 S.Ct. at 1900; Nix, 475 U.S. at 166, 106 S.Ct. at 994, see nn. 9-10, supra, see also Golden Eagle Distributing Corp. v. Burroughs Corp., 809 F.2d 584, 589 (9th Cir. 1987) (9th Cir. 1987) (Noonan J., dissenting from denial of sua sponte request for en banc hearing)<sup>24</sup>.

Presented here are two substantive issues which should be of critical concern to this court as a matter of policy for every court in the United States: (1) whether parties may present and attempt to perpetuate false testimony, sham issues

---

<sup>24</sup> "A client has as little right to the presentation of false arguments as he has to the presentation of false testimony. No conflict exists when a lawyer confines his advocacy by his duty to the court."

Id., 809 F.2d at 589.



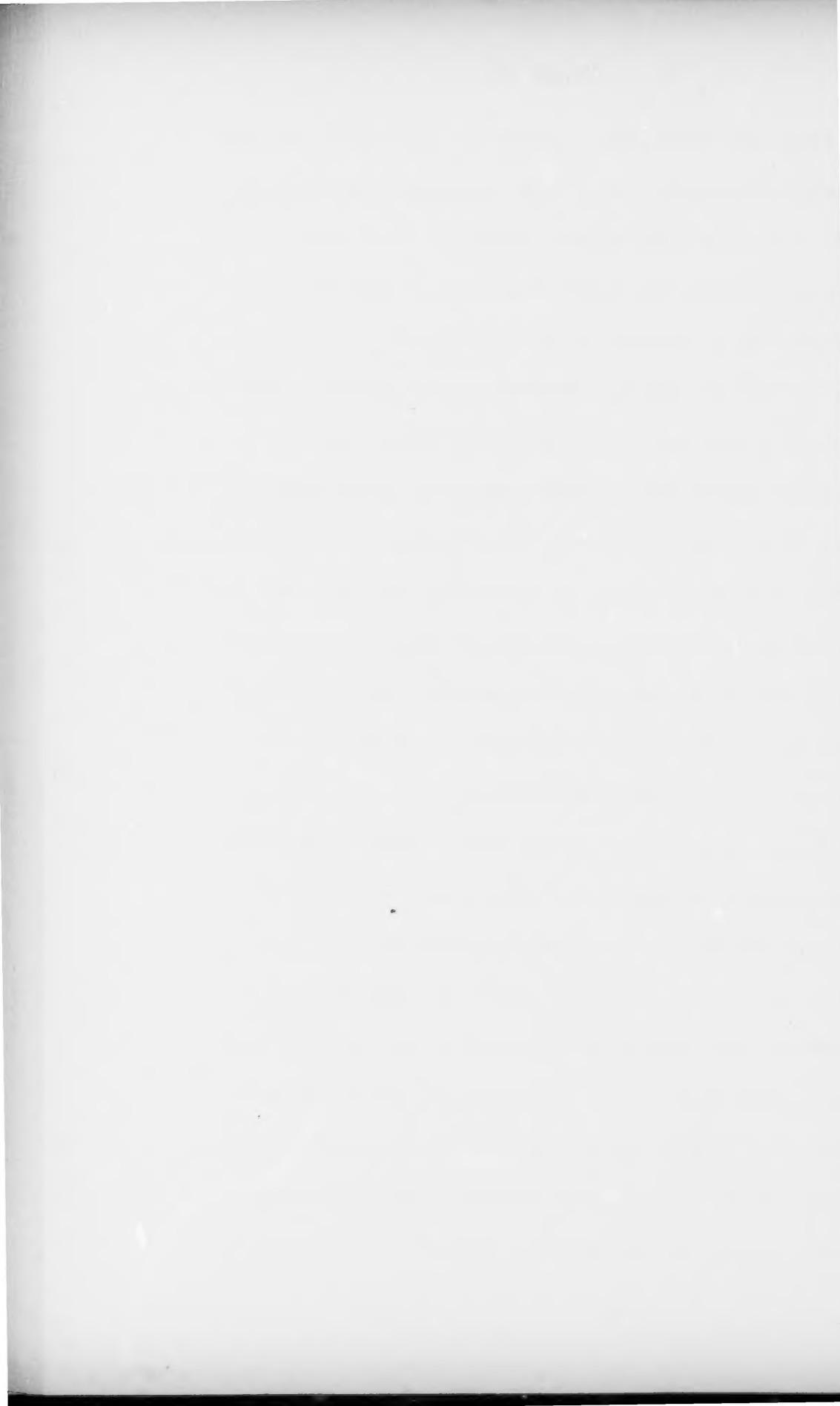
and sham pleadings and use their right of substitution to escape the consequences of such false testimony, sham issues and sham pleadings; and (2) whether a party, upon knowledge that his counsel has learned and intends to disclose that such parties have submitted false evidence, sham issues, and sham pleadings, can exercise his right to counsel by requiring the removal of his disclosing counsel and the substitution of new, acquiescent counsel before disclosing counsel can formally present to the appellate court the nature of the false testimony, sham issues and sham pleadings.

The Ninth Circuit not only failed to address how this court's mandated ethical obligations, as expressed in Nix and McCoy, are to be effectuated, but functionally precluded LEWIS & COMPANY from making its disclosures. As a consequence, LEWIS & COMPANY, a small practice consisting of two lawyers, at great financial and professional sacrifice, rejected an



offer of \$103,000, plainly intended to buy their silence, for the apparent privilege of begging the Ninth Circuit for the opportunity to tell the truth and to perform a lawyer's obligations.

In so doing, the Ninth Circuit left open a series of troubling questions, never previously addressed by this court or any other federal appellate court: what are the role and obligations of counsel to comply with the mandate of Nix and McCoy and to disclose the attempted perpetuation of false testimony before an appellate court? If LEWIS & COMPANY had not disclosed the false testimony, sham issues and sham pleadings, what risk would it have faced for having submitted the opening briefs? Should LEWIS & COMPANY have taken Adriana's money and knowingly allowed the Ninth Circuit to rely on a record which is not truthful or accurate? How is a disclosure consistent with Nix and McCoy to be made? Should the disclos-



ure be presented by way of conclusions, as here, or by describing the particularity the underlying factual premises of those conclusions, even at the risk of divulging attorney client information? Should be disclosures be presented in camera or for other parties to the appeal to see?

If meaning and effect are to be given to this court's mandate in Nix and McCoy and the public policy expressed thereby, these issues must be addressed now. To do otherwise, this court will allow to stand as precedent the policy de facto established by the Ninth Circuit that lawyers who comply with their ethical obligations of truthful advocacy and reject transparent bribes intended to prevent an appellate court from considering a truthful and accurate record, will not only not be accorded appropriate consideration, but will be made to suffer professionally and financially. Moreover, by such inaction, this court, as has the Ninth Circuit, will



send the unmistakable message to the legal community and to the public that lawyers who ignore their ethical obligations will be financially rewarded, professionally successful, and thus be those who regularly appear before the federal appellate courts and this court.

**IV. THE NINTH CIRCUIT'S IMPOSITION OF SANCTIONS AGAINST PETITIONERS REPRESENTS A GROSS DEPARTURE FROM JUDICIAL STANDARDS**

The Ninth Circuit's holding that the opening briefs were "frivolous" and that arguments raised are "rehashings of the facts and present hardly any legal analysis, App. I at 37, ignores the extensive (425) and appropriate citations to authority, as well as legal reasoning and presentation. See Supp. App. It is odd that briefs prepared by three lawyers, including graduates of Yale, Duke, and Columbia law schools, are now termed "frivolous".<sup>25</sup> How is it that these

---

<sup>25</sup> Involved in preparing the briefs were (a)



skills are suddenly lost in this one case?

The opinion of the Ninth Circuit, riddled as it is with misstatements and misrepresentations of the opening briefs and the record, is fundamentally premised on unsupported conclusions. For example, the opinion is founded principally on a pretext of purported discovery violations by LEWIS & COMPANY, ignoring the record reflecting that no discovery motion was ever filed, and no signed discovery request ever propounded. The opinion likewise ignores evidence in the record

---

Mr. Lewis, who has had approximately 30 record verdicts, settlements, and precedent-setting decisions on state and/or national levels during his 17-year career, including real property, banking, worker's compensation, child custody, and admiralty, (b) Neal P. Rutledge, informal of counsel to LEWIS & COMPANY, son of the late Justice Wylie Rutledge, formerly Duke University professor of trial practice, and whose career includes representing the Speaker of the U.S. House of Representatives before this court, and (c) Amy J. Cassedy, a 1985 law graduate of Columbia, a top-level, published editor at the Colum. J. Art & the Law, and a magna cum laude graduate of the University of Pennsylvania.



that despite the lack of a signed discovery request,<sup>26</sup> Adriana, through LEWIS & COMPANY,<sup>27</sup> produced all nonprivileged documents in its possession, and assisted in the production of documents in the possession of Adriana's former accountants.<sup>28</sup>

---

<sup>26</sup> The opinion states that Adriana "offers no authority to support its argument that an "unsigned copy" of a discovery request is "ineffective and can be ignored", failing to make any mention of Fed. R.Civ. P. 26(g) or of Central District Local Rule 8.3, which prohibits the filing of discovery requests until such requests are at issue. If the discovery document served on counsel is not the operative document, Fed. R.Civ. P. 26(g) is read out of existence.

<sup>27</sup> The opinion does not explain why LEWIS & COMPANY is accountable for Adriana's document production. At the same time, however, the Ninth Circuit precluded LEWIS & COMPANY from opportunity to respond on such issues.

<sup>28</sup> Specifically, (a) pursuant to a sua sponte bench order by the district court, without notice, calling for the production of documents within one hour, Adriana produced hundreds of documents, RT 3/3/87 at 11-13, Exhs. "4"- "6" to CR 121, (b) Adriana produced additional documents pursuant to a telephone conference (without a formal motion, procedures, or record), in which Mr. Carroll, while threatening contempt, "clarified" certain incomprehensible categories from Thoeren's unsigned request and "ordered" production on approximately one business day's notice, Exhs.



Likewise, the opinion states that appellants raised Fjelstad v. American Honda Motor Co., Inc., 762 F.2d 1134, 1342 (9th Cir. 1985), "for the first time in its reply brief", i.e., by substituted counsel, App. I at 24, ignoring 11 citations to Fjelstad in the opening brief of Zade, Kunz, and Midgen, including for the proposition that discovery sanctions must be "specifically related to the particular claim at issue in the discovery order", 762 F.2d at 1342, i.e., the same holding the opinion states was not raised. Supp. App., Op. Br. Zade, et al. at 2.<sup>29</sup>

---

"9", "12"--"14" to CR 121, (c) Adriana produced "source" financial documents, although Thoeren's unsigned request did not call for same, Exhs. "16", "21" to CR 121, and (d) LEWIS & COMPANY arranged, for Mr. Carroll's convenience, to copy approximately 3,000 pages produced under subpoena by Adriana's former accountant. Exh. "29" to CR 121, Exhs. "A", "C" to CR 191.

<sup>29</sup> The record also fails to support statements in the opinion that Adriana "repeatedly" failed to appear at "scheduled" depositions. In fact, (a) Midgen appeared and testified at deposition, Exh. "25" to CR 124, (b) Adriana's local officer testified on four occasions, see, e.g., Exh. "4" to CR 121, (c)

I

)

)

,

7

Similarly, the opinion holds that a motion to reconsider the amended judgment was filed "after the ten day limit to file such motions ... had expired", App. I at 35, squarely overlooking Fed. R.Civ. P. 6(a) ("[w]hen the period of time prescribed or allowed is less than eleven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation").<sup>30</sup>

Further, the court agreed with the position asserted in the opening briefs that damages for emotional distress are not available on a judgment for fraud. If the opening briefs were "frivolous", how was that argument sustained?<sup>31</sup>

---

and Kunz and Zade were in Los Angeles during June, 1987 to be deposed, but counsel for Thoeren refused to go forward. CR 121.

<sup>30</sup> The amended judgment was entered April 29, 1988; the motion for reconsideration was filed ten court days later, May 13, 1988.

<sup>31</sup> Moreover, the Ninth Circuit held that new counsel for Adriana "substantially improve" the arguments of the opening briefs, App. at 38; however, new counsel in their reply brief and/or during oral argument, adopted most of



Finally, the award of damages pursuant to 28 U.S.C. §1927 as a result of the briefs purporting using "one-and-one half line spacing", App. I at 38, (a) squarely contradicts the Ninth Circuit's August 29, 1989 order expressly approving the form and spacing of the opening briefs, (b) fails to make any finding of "intent, recklessness or bad faith" to support the imposition of excess attorney fees under 28 U.S.C. §1927, see, e.g., Barnd v. City of Tacoma, 664 F.2d 1339 (9th Cir. 1982), and (c) fails to consider the fundamental precept that "only authorizes the taxing of excess costs arising from an attorney's unreasonable and vexatious conduct .... "U.S. v. Blodgett, 709 F.2d 608, 610 (9th Cir. 1983).

To say that awarding attorney fees and double costs pursuant to Fed. R.App.

---

the arguments raised in the opening briefs, despite purporting to "abandon" issues raised in the opening briefs.

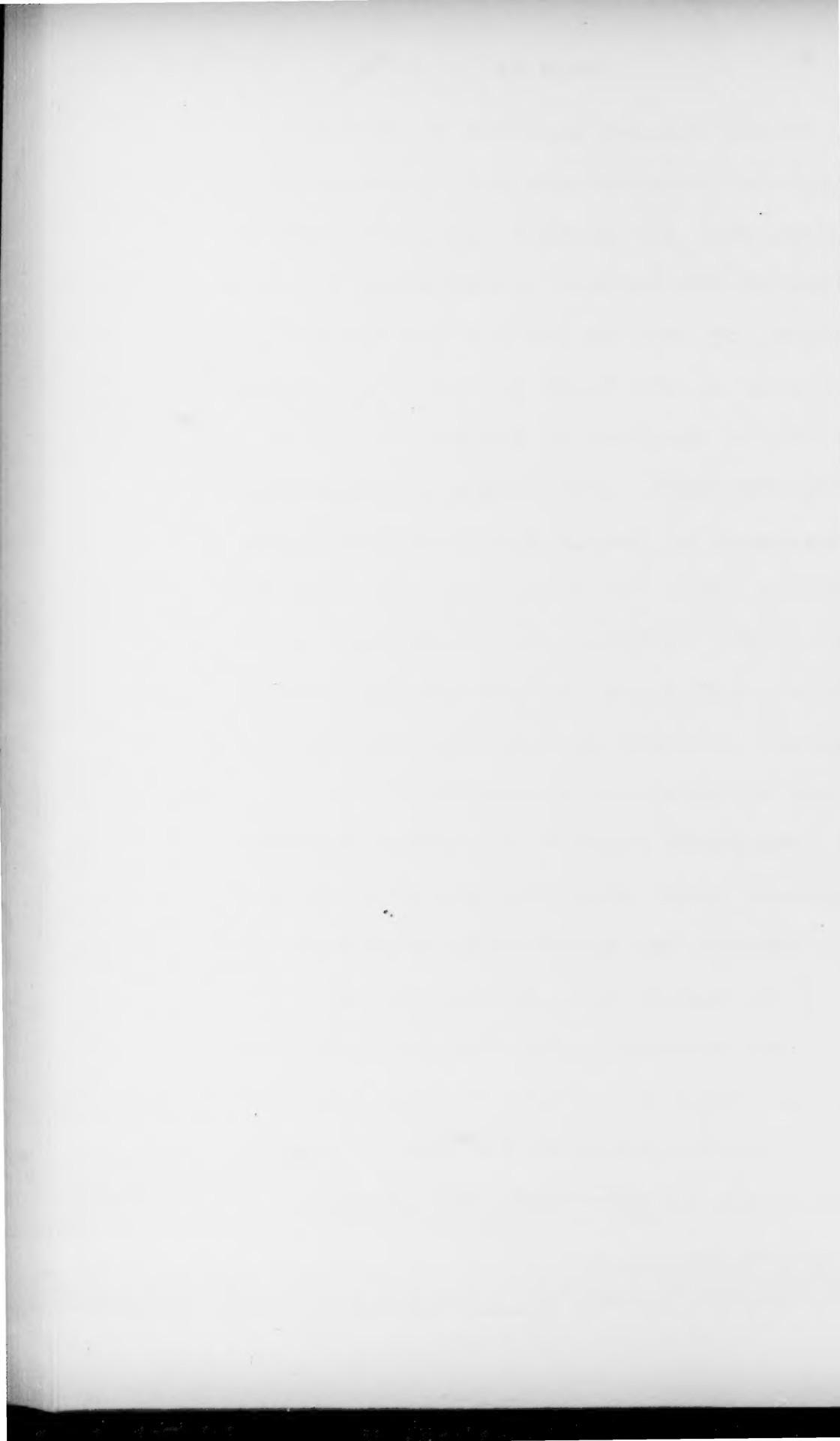


P. 38 and damages pursuant to 28 U.S.C. §1927 is inappropriate and violative of fundamental due process considerations in light of the serious constitutional issues raised, as well as LEWIS & COMPANY's reliance on the Ninth Circuit's own prior order for the form of the briefs, is an understatement. See Acosta v. Louisiana Department of Health and Human Resources, 478 U.S. 251, 106 S.Ct. 2876, 92 L.Ed.2d 192 (1986) (petition for certiorari not "frivolous" where raising direct conflict between circuits over interpretation of rules of appellate procedure).

**V. THE NINTH CIRCUIT IMPROPERLY AFFIRMED DISTRICT COURT SANCTIONS VIOLATIVE OF DUE PROCESS AND ESTABLISHED STANDARDS**

**A. Motion for Reconsideration**

The district court imposed sanctions against LEWIS & COMPANY, Adriana and the third party defendants for the filing of the motion to reconsider the amended



judgment of April 29, 1988.<sup>32</sup> While the court's original judgment entered April 13, 1988 found no liability against Midgen or AFP, Thoeren filed a document styled "Application to Correct or Modify Judgment", CR 174, seeking under Fed. R.Civ. P. Rules 59(e) and 60(a) to include findings of liability against Midgen and AFP, as well as to find additional damages against Zade. A bare eight days later, in contravention of local notice and hearing requirements, and without providing any opportunity for opposition, the district court granted Thoeren's "application".

By the district court so amending the judgment, not only did the district court violate fundamental notions of due pro-

---

<sup>32</sup> The amended judgment was prepared by counsel for Thoeren pursuant to a practice that, although made part of the local rules of the Central District of California, has been specifically disapproved by the Ninth Circuit. See Cher v. Forum International, Ltd., 692 F.2d 634, 637 (9th Cir. 1982), noting the "regrettable practice" of permitting the winning lawyers to draw findings of fact, giving such findings "special scrutiny".



cess, but a motion for reconsideration of the amended judgment was (a) appropriate and (b) not sanctionable conduct.<sup>33</sup> 6A Moore's Federal Practice, para. 59.13[4] at 59-302, 303.<sup>34</sup>

#### B. Motion to Disqualify Counsel

The district court also sanctioned LEWIS & COMPANY and Adriana for having brought a motion to disqualify counsel for Thoeren. Such motion was based upon undisputed evidence that counsel for Thoeren (a) acted as secretary for and performed services for Adriana in matters substantially related to this litigation, see Evans v. Artek Systems Corp., 715 F.2d 788, 792 (2d Cir. 1983), Global Van Lines

---

<sup>33</sup> This issue was sufficiently important that it was one of only two issues raised by Adriana and the third party defendants in their appellate petition for rehearing.

<sup>34</sup> Moreover, the "application" was unsupported by either Fed. R.Civ. P. 59(e) (to correct "deliberative errors", see Scola v. Boat Frances R., Inc., 618 F.2d 147, 152 (1st Cir. 1980), or Fed. R.Civ. P. 60(a) (to correct clerical, "ministerial", or "inadvertent" errors, Scola, 618 F.2d at 152).



v. Superior Court, 144 Cal.App.3d 490, 192 Cal.Rptr. 609 (1983), (b) acted as negotiator for Thoeren and Adriana, Civil Service Comm., 163 Cal.App.3d at 81, 209 Cal.Rptr. at 167, (c) witnessed events critical to this litigation, Comden v. Superior Court, 20 Cal.3d 906, 912, 145 Cal.Rptr. 9, 546 P.2d 971 (1987); Lyle v. Superior Court, 122 Cal.App.3d 470, 482, 174 Cal.Rptr. 918, 926 (1981), and (d) withheld mail belonging to Adriana, thus plainly holding itself out as counsel for Adriana. Emle Industries, 478 F.2d at 571.<sup>35</sup>

Had Adriana not withdrawn the issue of the disqualification of counsel on its reply brief, the district court's denial of the motion should have been reversed. Under any circumstance, however, the

---

<sup>35</sup> Despite this evidence in the record, the Ninth Circuit nonetheless held that "Lewis offered no facts" showing an attorney-client relationship between Thoeren's counsel and Adriana. App. I at 34.



arguments presented in the motion were "well-grounded in fact and ... warranted by existing law." Fed. R.Civ. P. 11; see also Cal. Archit. Bldg. Prod. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1472 (9th Cir. 1987). Nor was the motion "interposed for any improper purpose", Fed. R.Civ. P. 11; indeed, Adriana, through LEWIS & COMPANY, brought the motion on shortened time so as to minimize (a) prejudice to Thoeren should he need to seek new counsel and (b) delay in discovery proceedings. CR 16; Trust Corp. of Montana v. Piper Aircraft Corp., 701 F.2d 85, 87 (9th Cir. 1983).<sup>36</sup>

### C. Sanctions for Deposition

As part of the award of sanctions for

---

<sup>36</sup> Additionally, the award was infirm for the failure of notice and opportunity to be heard, see Tom Grown Equipment v. Shelley Irrig. Devel., 834 F.2d 833, 835 (9th Cir. 1987), and for awarding a lump sum amount reflecting all attorney time incurred by Thoeren's counsel since the inception of the litigation. See In re Matter of Yagman, 796 F.2d 1165, 1184-85 (9th Cir. 1986) as amended, 803 F.2d 1085.



the motion for disqualification, the district court imposed and the Ninth Circuit affirmed without comment sanctions for purported "obstructionist conduct" at the deposition of Adriana's custodian of records. That ruling fails (a) for lack of notice and opportunity to be heard, Tom Growney Equip. v. Shelley Irrig. Devel., 834 F.2d 833, 835 (9th Cir. 1987), (b) lack of specification as to what objections, if any, were purportedly offending, see Fjelstad, 762 F.2d 1334, and (c) being a lump sum award without allocation to any purportedly offending conduct, see In re Matter of Yagman, 796 F.2d 1165, 1184-85 (9th Cir. 1986), as amended, 803 F.2d 1085.

#### D. Local Rule Sanctions

Central District Local Rule 6.2 requires the parties to submit a joint report following a meeting at the commencement of the litigation, setting forth approximately six nonargumentative items



of information. LEWIS & COMPANY proposed two different reports, each setting forth the required information. Counsel for Thoeren, however, proposed a series of reports containing false, self-serving, and prejudicial information extraneous to the local rule. Consistent with Fed. R.Civ. P. 11, LEWIS & COMPANY declined to sign such documents; nonetheless, the district court imposed a sanction of \$990 against LEWIS & COMPANY and Adriana. See Societe International Pour Participations Industrielles et Commerciales v. Rogers, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958) (complying with one obligation cannot form the basis for punishing the violation of another, conflicting obligation).

#### E. Contempt Finding

By order dated June 4, 1987, and affirmed by the Ninth Circuit, the district court held LEWIS & COMPANY and Adriana in contempt for "refus[ing]" to



pay the sanctions for the motion to disqualify counsel and the purported local rule violation "forthwith" from the court's oral orders of March 16, 1987 and March 24, 1987 and written orders of March 31, 1987 CR 58. Fairly read, that order holds that when LEWIS & COMPANY was immediately in contempt when it did not tender a total of nearly \$6,000 in the courtroom immediately upon the announcement of each award of sanctions, notwithstanding that the court announced that written orders on each award of sanctions were forthcoming and that the written orders were not in fact entered until March 31, 1987, one and two weeks, respectively, following the oral announcement of the sanctions orders.

Moreover, the purported motion for contempt (a) was brought prematurely, i.e., before the March 31, 1987 orders became final pursuant to Fed. R.Civ. P. 59(e), (b) was brought despite any specified time for compliance, other than the



undefined "forthwith", (c) was rejected by the clerk of the court for failure to include a memorandum of points and authorities, a defect that was never corrected, such that LEWIS & COMPANY was held in contempt based on neither a properly pending motion nor an order to show cause.

**E. Kordich Should Be Overruled**

That the interests of lawyer and client are not synonymous, as required under Kordich v. Marine Clerks Ass'n, 715 F.2d 1392 (9th Cir. 1983), is never demonstrated more clearly than in this case. Here, the clients claimed an absolute right to substitute new counsel for the improper purpose of perpetuating false testimony, concealing false issues, and raising new false issues, including issues which positioned the parties against their former counsel. Accordingly, to assume a concurrence of interests between counsel and client, as in Kordich, is not only



unfair, but inherently and invidiously discriminatory and violative of fundamental notions of due process. U.S. Const. amends. V and XIV.

The original imposition of sanctions against LEWIS & COMPANY is now almost four years old. Reversal alone does not make the lawyer whole. F.D.I.C. v. Tefken Const. and Inst. Co., 847 F.2d 440 (7th Cir. 1987) (a lawyer's "bread and butter", his or her "reputation for integrity, thoroughness and competence"). To carry the mark that this case presents is itself damaging in maintaining or broadening a client base. Whatever purpose is served by Fed. R.Civ. P. 11 or other sanctioning process, that purpose must be juxtaposed against the continuing deleterious effect on the practice of law and the quality of justice when fear and improper coercion dominate a judicial proceeding. Accordingly, this court should establish procedures which allow for either the immediate



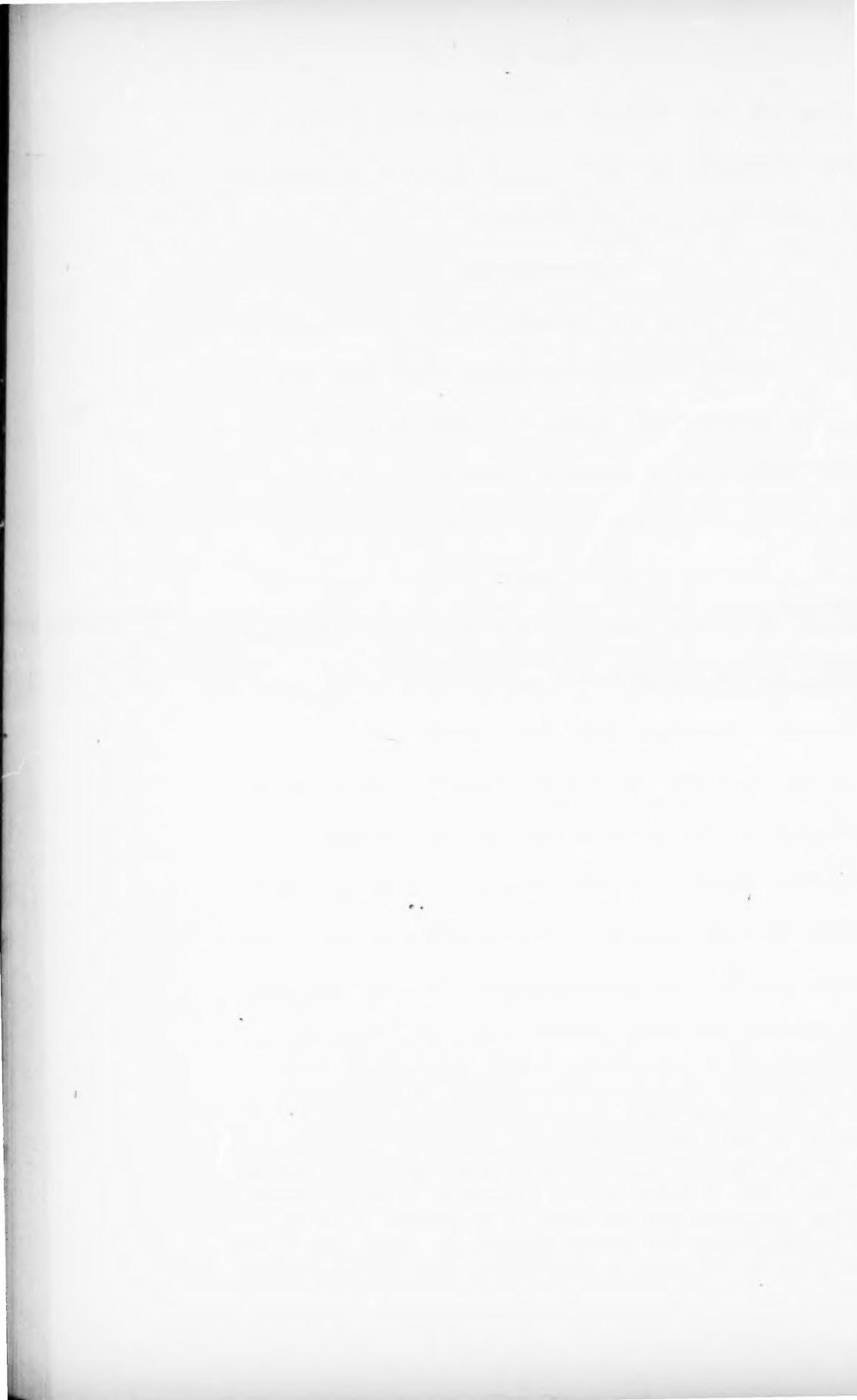
stay of all effect or immediate review of any summary adjudication in the nature of a sanction.

### **CONCLUSIONS**

From the beginning, this litigation has been a charade passing for justice. LEWIS & COMPANY posed to the Ninth Circuit the scenario presented above, namely, if this court permits the sort of justice meted out by the district court and the Ninth Circuit and the conduct by Adriana and its successor counsel, the only successful lawyers and thus those who will appear before this and federal appellate courts, will be limited to those who ignore their ethical obligations as officers of the court. The Ninth Circuit has made plain its preference.<sup>37</sup> Lay people,

---

<sup>37</sup> By this petition, LEWIS & COMPANY does not mean to impugn every judge of the Ninth Circuit. However, it is not clear whether LEWIS & COMPANY's petition for rehearing and suggestion for hearing en banc was distributed to all the judges of the Ninth Circuit. (The order denying as untimely the petition does not, contrary to usual practice, disclose a vote.) It would be startling and frightening



lawyers from areas outside the Ninth Circuit understand -- and are astonished and appalled by -- the corruption inherent in Judge Real's practice of appointing his long-time friend as a surrogate judicial officer. No immense number of words, no Alice in Wonderland opinion can change the facts. LEWIS & COMPANY, for one, will not bury its head in the sand, pretend what is up is down, what is corrupt is acceptable.

LEWIS & COMPANY's statement to the Ninth Circuit bears repeating here:

"Where is the danger? Mr. Lewis carries no weapon; he is not part of a 100-lawyer firm representing institutional clients ... Where is the danger? In words that speak the truth? In words that challenge

---

indeed if no judge voted to rehear the case or had the courage to dissent from a decision not to rehear the case en banc.



"authority"? To challenge authority is the only true or effective exercise of the mind. From Shakespeare to Shelly, from Disraeli to Silone, and, most recently, to Walesa and Havel, the tax of freedom is to continually challenge Authority and require its moral justification."

Lewis Rpl. at 19.

Wherefore, LEWIS & COMPANY respectfully requests that this court grant the within petition for writ of certiorari to the U.S. Court of Appeals for the Ninth Circuit.

Dated: December 10, 1990

Respectfully submitted,

LEWIS & COMPANY

By: \_\_\_\_\_

L. Burke Lewis  
22203 Pac. Coast Hwy.  
Malibu, CA. 90265  
(213) 317-1285

90-994

(2)

CASE NO. \_\_\_\_\_

Supreme Court, U.S.

FILED

DEC 10 1990

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1990

\*\*\*\*\*

LEWIS & COMPANY, LAWYERS,  
L. BURKE LEWIS, AMY J. CASSEDY,

Petitioners

vs.

KONSTANTIN THOEREN, PATROLA FILMS, INC.,  
PATROLA, G.m.b.H., ADRIANA INTERNATIONAL  
CORPORATION, HANS A.-KUNZ, KEMAL ZEINAL-  
ZADE, ANTHONY M. MIDGEN, ARIAN FILMS  
PRODUCTIONS, LTD., ARTHUR L. MARTIN,

Respondents

\*\*\*\*\*

ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
NINTH CIRCUIT

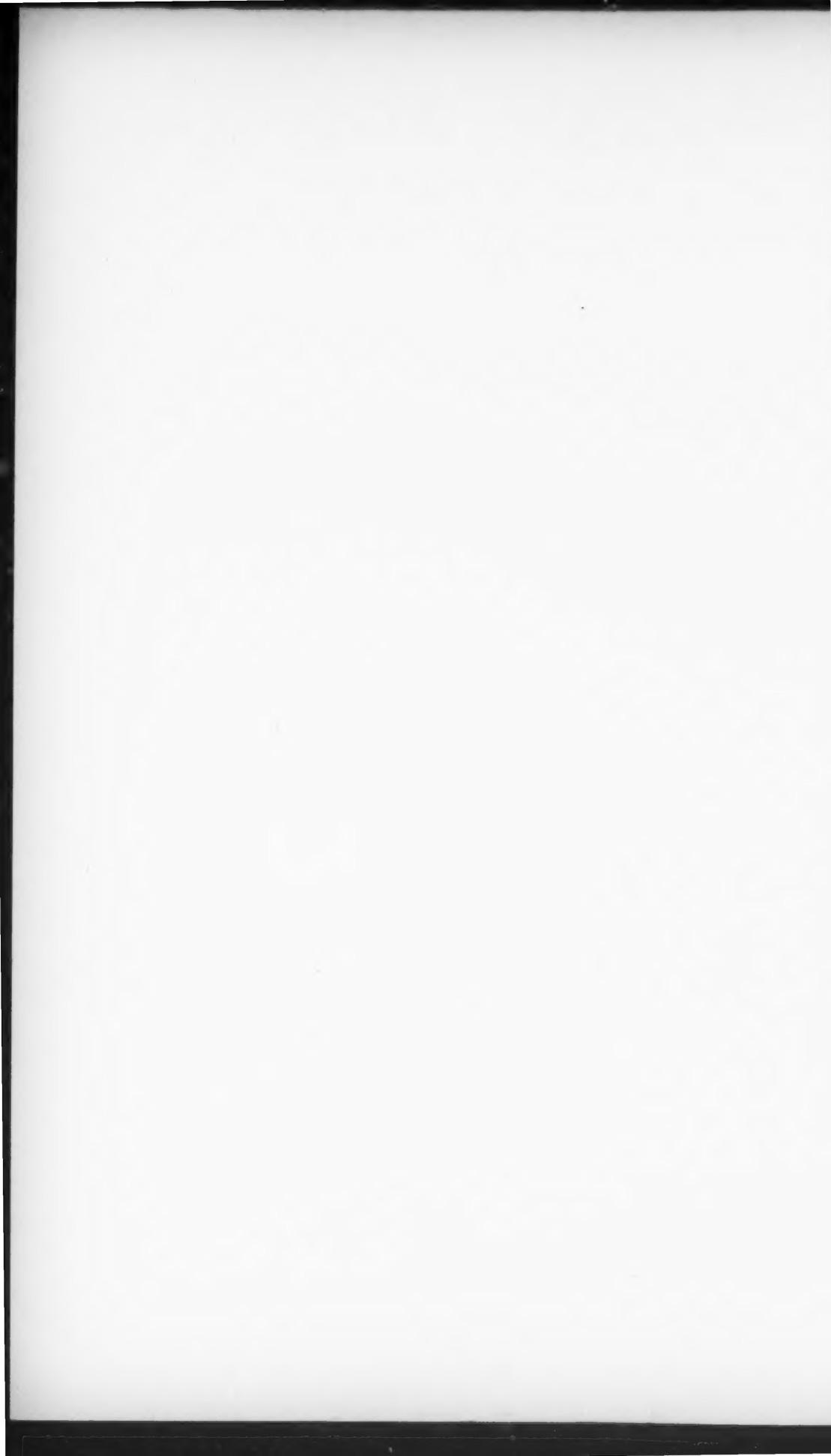
\*\*\*\*\*

APPENDIX TO PETITION FOR WRIT OF  
CERTIORARI

\*\*\*\*\*

L. Burke Lewis  
22203 Pacific Coast Highway  
Malibu, California 90265  
(213) 317-1285  
Counsel for Petitioners

Of Counsel:  
Amy J. Cassedy  
Malibu, California



APPENDIX I

OPINION OF THE UNITED STATES COURT OF APPEAL  
FOR THE NINTH CIRCUIT

Published at 913 F.2d 1406 (9th Cir.1990)

Argued and Submitted June 7, 1990

Decided September 10, 1990

ADRIANA INTERNATIONAL	)	Nos. 88-6107
CORPORATION, etc.	)	88-6424
	)	
Plaintiff-	)	
counter-defendant/	)	
Appellant	)	
	)	
vs.	)	DC# CV-86-6775-MLR
	)	Central California
	)	
LEWIS & COMPANY,	)	
et. al.,	)	
	)	
Intervenors/	)	
Appellants,	)	
	)	
KONSTANTIN THOEREN,	)	
et. al.,	)	
	)	
Defendants-	)	
counter-claimants/	)	
Appellees	)	
	)	
vs.	)	
	)	
HANS A. KUNZ, et. al.,	)	
	)	
Third-party	)	
defendants/	)	
Appellants.	)	
	)	

---



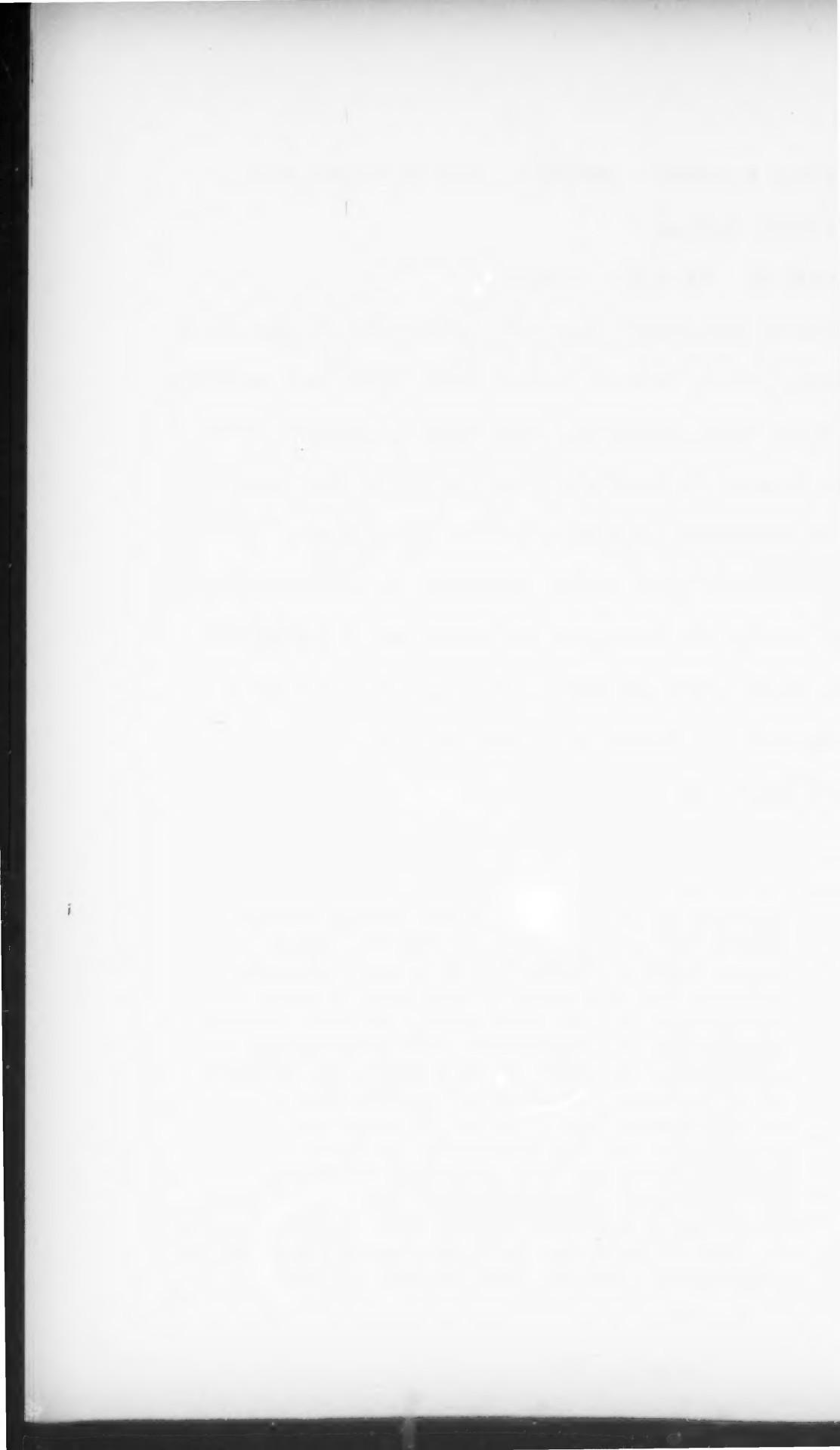
Before ALARCON, BRUNETTI and O'SCANNLAIN,  
Circuit Judges.

BRUNETTI, Circuit Judge:

Adriana International Corporation, Arian Film Productions, Kemal Zade, Hans Kunz and Anthony Midgen (collectively "Adriana") appeal from the district court's dismissal of Adriana International Corporation's complaint, striking of all their answers to cross-claims and entry of default judgment as a sanction for discovery abuses. The court entered a judgment in favor of Thoeren for \$8.5 million.<sup>1</sup>

---

<sup>1</sup> During this appeal, appellants fired their attorney, Mr. L. Burke Lewis. Lewis had already filed four opening briefs in the case. Adriana's new attorneys filed the reply brief, which specifically abandons the following arguments raised in the opening briefs: 1) disqualification of Judge Real; 2) disqualification of Thoeren's attorney; 3) impropriety in the appointment of the special master; 4) personal jurisdiction over AFP; and 5) timely service under Fed.R.Civ.P. 4(k) on AFP. Because Adriana abandoned these arguments, we do not address them.



## STANDARD OF REVIEW

The imposition of discovery sanctions pursuant to Fed.R.Civ.P. 37 is reviewed for abuse of discretion. *North American Watch Co. v. Princess Ermine Jewels*, 786 F.2d 1447, 1450 (9th Cir.1986). Absent a definite and firm conviction that the district court made a clear error in judgment, this court will not overturn a Rule 37 sanction. *Halaco Engineering Co. v. Costle*, 843 F.2d 376, 279 (9th Cir. 1988). Findings of fact related to a motion for discovery sanctions are reviewed under the clearly erroneous standard. *Id.* If the district court fails to make factual findings, the decision on a motion for sanctions is reviewed *de novo*. *United States for the Use and Benefit of Wiltec Guam, Inc. v. Kahaluu Construction Co.*, 857 F.2d 600, 603 (9th Cir.1988).

We apply an abuse of discretion standard in reviewing all aspects of a district court's decision in imposing sanctions under Rule 11.



Cooter & Gell v. Hartmarx Corp., --U.S.--, 110 S.Ct. 2447, 2461 L.Ed.2d 359 (1990).

**FACTS AND PROCEEDINGS BELOW**

The underlying actions in this case involve an oral agreement between Adriana and Thoeren pursuant to which Thoeren was to produce movies in the Soviet Union. As part of this deal, Adriana Corporation was formed. Thoeren was to own 30% of the stock, in addition to receiving a salary. The remainder of the stock was owned by Kunz, Zade and Midgen. All of the Adriana stock was to be held in trust by Adriana Film Productions (AFP), a Bahamian corporation controlled by Zade in which Kunz and Midgen were officers and directors. No films were ever produced pursuant to the agreement.

In October, 1986 Adriana sued Thoeren for breaching the agreement. Thoeren filed an answer and counterclaims against Adriana Corporation. Thoeren also filed cross-claims against Zade, Kunz, Midgen and AFP. Lewis was hired to represent Adriana Corporation, Zade,

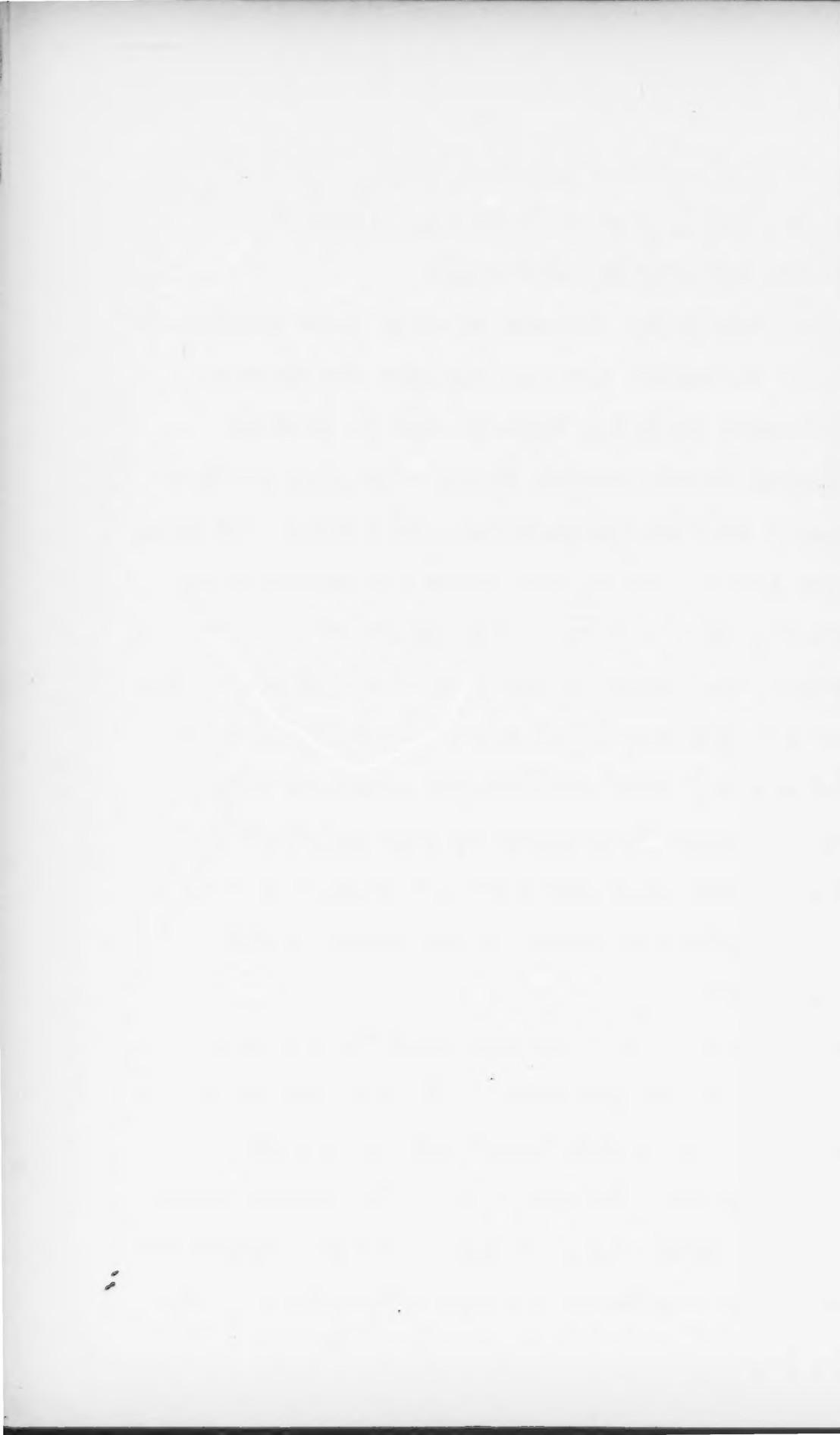


Kunz, Midgen and AFP. On December 16, Thoeren requested an initial meeting with counsel pursuant to Local Rule 6. Lewis failed to appear for the meeting.

On December 31, Thoeren served notice of a discovery request seeking depositions on February 5 and production of documents on February 2. Another copy of this request was sent to Adriana on January 30, 1987.

On February 2, 1987 Adriana failed to produce any documents as requested in the December 31 notice and sent no written response. On February 5, 1987 Lewis and his client failed to appear for the properly noticed deposition of Adriana Corporation. On February 9, Lewis served a response to Thoeren's request for production of documents listing various objections.

On February 13, Adriana sent a letter to Thoeren alleging Thoeren's attorney had a conflict of interest and refusing to produce any documents or attend discovery based on this. On February 24, Thoeren again requested



production of documents by March 2 and depositions on March 5. On March 2, Adriana refused to produce any documents.

On March 3, the district court ordered Adriana to produce all documents requested and appear for deposition. The court warned Adriana that they were getting into "deep trouble." On March 4, Adriana produced a few documents. On March 24, the court ordered monetary sanctions against Lewis and Adriana for their refusal to sign the Local Rule 6 Joint Statement. On March 16, the court denied Adriana's motion to disqualify Thoeren's counsel and sanctioned them for bringing a frivolous motion. The court also ordered a special master to preside over discovery. Adriana did not pay the court-ordered sanctions when requested by Thoeren on March 17 and 23.

On March 23, the special master ordered Adriana to disclose information regarding AFP. Adriana did not, and Thoeren was unable to serve AFP as the corporation was incorrectly identified in the pleadings. On April 30, the



special master ordered Adriana to produce documents no later than May 4 and awarded sanctions against Adriana. On May 4, Adriana again failed to produce documents. The special master found that Adriana's failure to produce documents was willful.

Adriana produced some documents on May 6, 1987. On May 19, the court found Lewis and Adriana in contempt to failure to pay the sanctions ordered on March 16 and sanctioned them an additional \$2,500.

On June 8, the special master ordered Adriana to produce documents claimed by Adriana to be privileged. On June 23, Midgen's deposition was to be taken. On that day, Adriana made an oral motion for a protective order to stop all discovery which was denied by the special master. The deposition was cancelled due to Lewis' illness and reset for June 24. The special master also ordered production of documents still not produced, and further ordered Kunz' deposition on July 7th and 8th, Zade's deposition on July 9th and 10th, and



Thoeren's deposition on July 14, 15 and 16.

On July 1, Lewis informed Thoeren that Kunz and Zade would not appear for the depositions.

No motions for protective orders were filed.

Kunz and Zade failed to appear for depositions on July 7-10. Lewis continued to refuse to produce various documents.

On November 10, the special master again ordered production of documents. The special master gave Adriana twenty days to appeal the order to the district court but Adriana did not. Adriana did not produce the documents.

On November 23, the district court ordered the deposition of Kunz and Zade for December 14.

Kunz and Zade failed to appear for depositions and no motions for protective orders were filed.

On February 16, 1988 the district court granted Thoeren's motion to dismiss Adriana Corporation's complaint, to strike Adriana's answers to the cross and counter-claims and to enter a default judgment. The court based its decision on the willful refusal of Adriana,



acting through their counsel, to proceed with discovery and to obey the orders of the court and the special master. The court entered a default judgment for \$8.5 million for Thoeren against Adriana on April 14. The court amended its judgment on April 29 to correct some clerical errors.

Adriana filed a motion to reconsider the judgment, which was denied. The court sanctioned Adriana under Fed.R.Civ.P. 11 for the motion to reconsider because it was frivolous. Adriana then appealed to this court, presenting a myriad of arguments in their four opening briefs.<sup>2</sup>

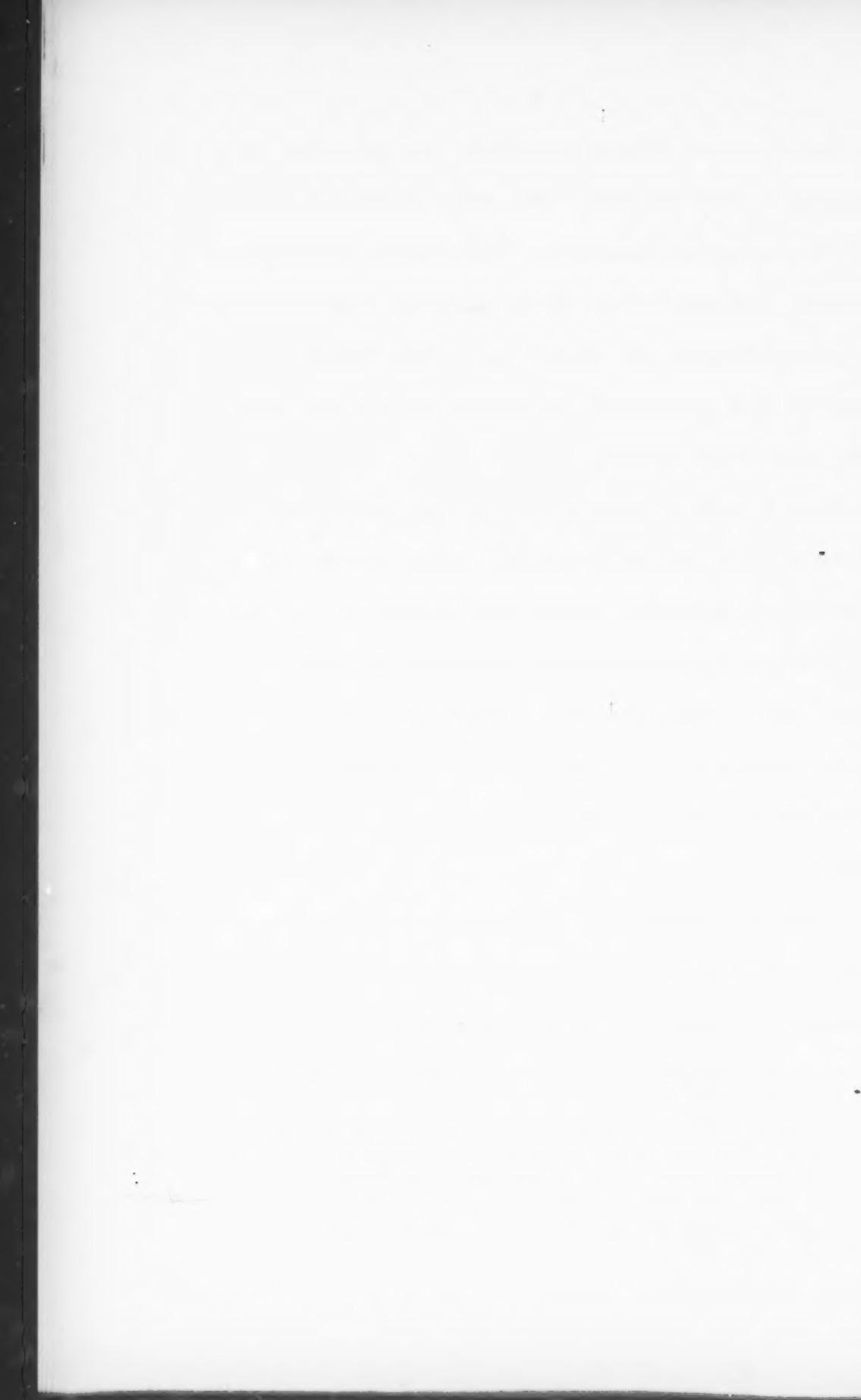
#### DISCUSSION

##### I. Special Master

Adriana argues that the special master's actions in imposing discovery sanctions were unconstitutional because the special master

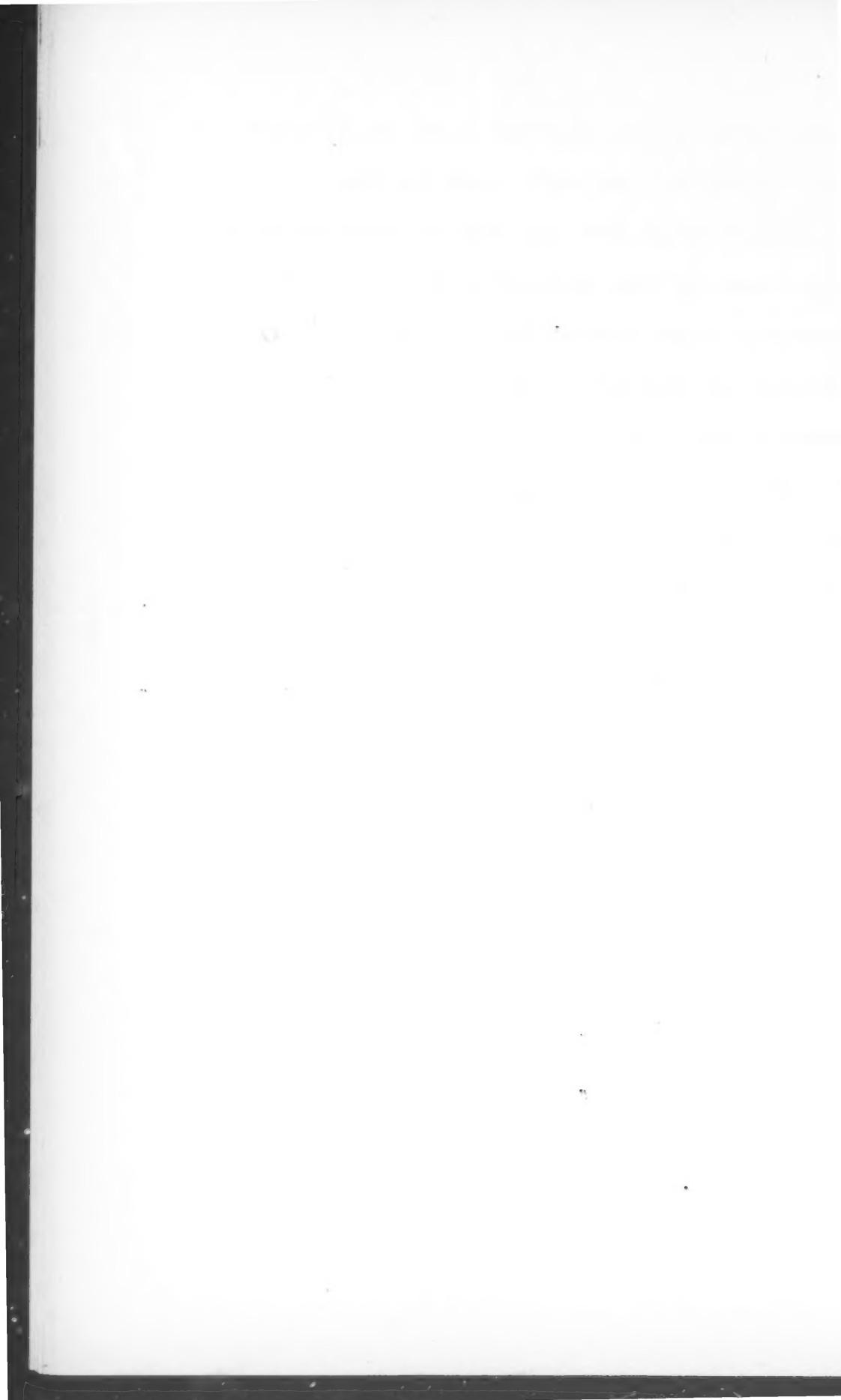
---

<sup>2</sup> One of these arguments concerns a request for judicial notice of an action between Thoeren and his insurance company. This other action is not relevant to this case, and we decline to take judicial notice of it.



was performing the functions of an Article III judge. However, an objection to the appointment of a special master must be made at the time of the appointment or within a reasonable time thereafter or the party's objection is waived. *Spaulding v. University of Washington*, 740 F.2d 686, 695 (9th Cir.), cert. denied, 469 U.S. 1036, 105 S.Ct. 511, 83 L.Ed.2d 401 (1984), overruled on other grounds *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir.1987).

Adriana did not object to the appointment of the special master at the time of the appointment. Adriana attended numerous meetings, depositions and hearings with the special master regarding discovery throughout March, April, May and June of 1987. Adriana finally objected to the appointment of a special master on July 6, 1987. Because the objection was not filed within a "reasonable time" of the appointment, Adriana waived its objection to the special master's appointment.



## II. Rule 37 Dismissal and Default Judgment

The district court imposed the sanction of a default judgment against Adriana pursuant to Fed.R.Civ.P. 37(b) and (d) because of their numerous discovery abuses.<sup>3</sup>

3 Rule 37 provides:

(b) **Failure to comply with Order.**

(2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discover, ... the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(d) **Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for

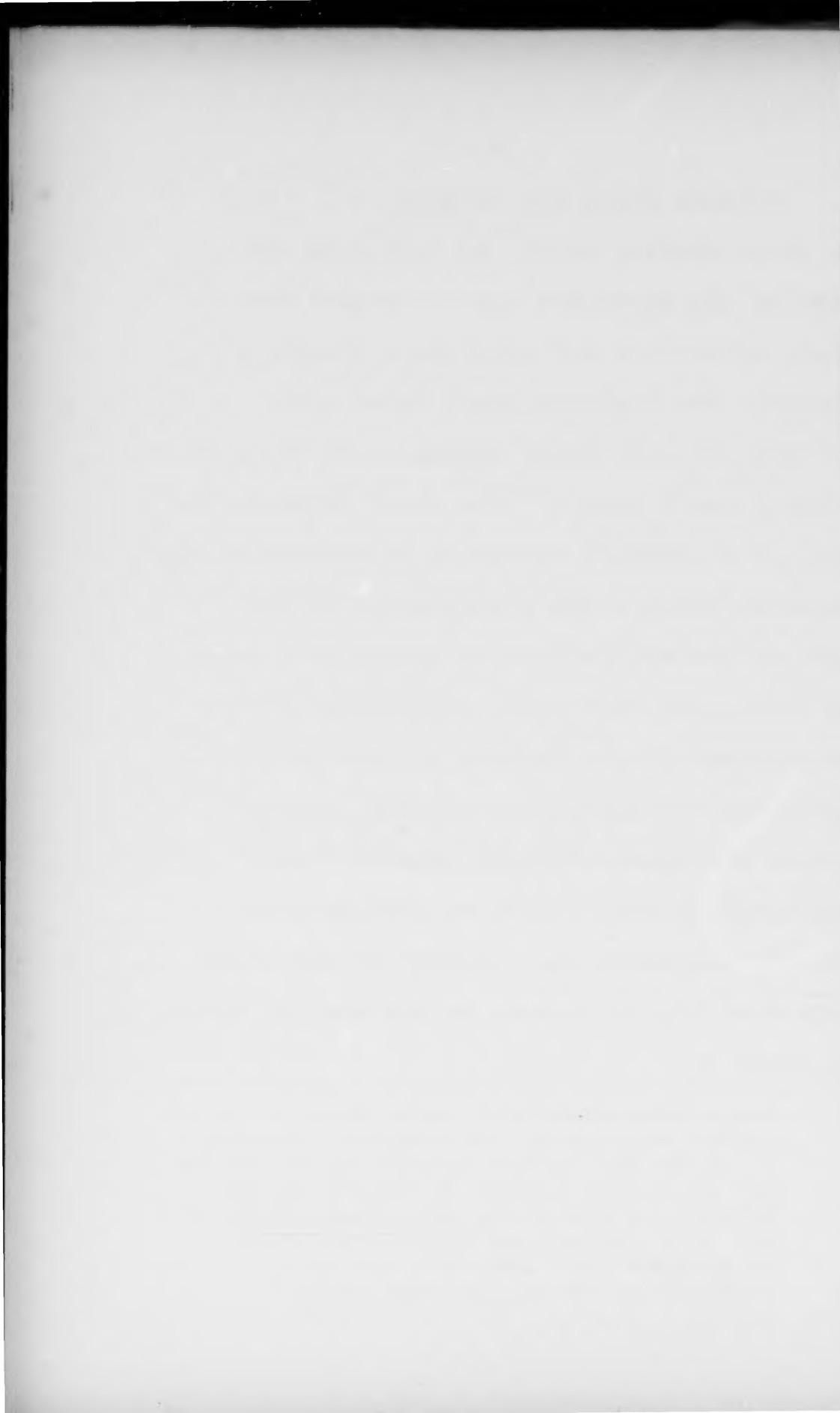


A. *Factual Basis for Default*

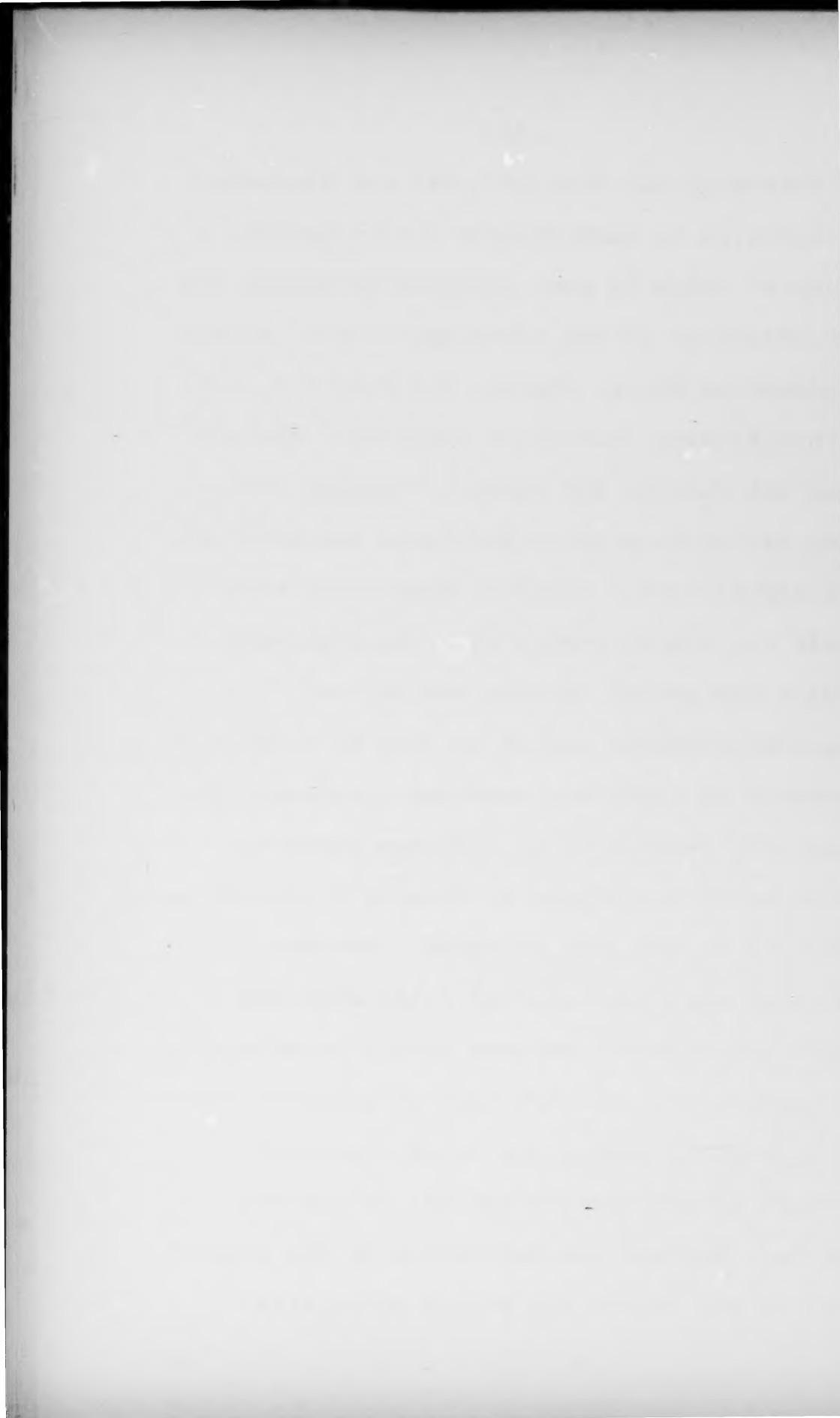
In their opening brief, Adriana does not dispute the facts but instead argues that their actions do not constitute discovery abuses. The district court found that Adriana, through their counsel, had violated several court orders. The court cited to the failure to produce documents as ordered by the court on March 3 and subsequently by the special master, failure to appear as ordered at deposition July 7-10, on November 23, and on December 14-16; failure to make themselves available for deposition in June, 1987 and making misrepresentations regarding the depositions; and failure to provide accurate information about the identify of the cross-defendant AFP as ordered by the special master on March 23.

---

inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule.



"A determination that an order was disobeyed is entitled to considerable weight because a district judge is best equipped to assess the circumstances of the non-compliance." *Halaco Engineering Co. v. Costle*, 843 F.2d 376, 379 (9th Cir.1988) (citations omitted). Adriana does not dispute the factual findings that they failed to produce documents and show up for depositions. Instead, they argue that their failure to comply with the discovery orders was proper because the initial discovery request served on them by Thoeren on December 31, 1986 was unsigned. However, the discovery request filed with the court on December 31 was signed by Thoeren's counsel as required by the federal rules. Adriana concedes that the original filed with the court was signed. Adriana offers no authority to support its argument that an unsigned copy of a properly signed and filed discovery request is ineffective and can be ignored. Further, Adriana did not object to the request when it was served but waited until after



discovery was over. Therefore, the initial discovery request was proper.

Adriana also attempts to justify its failure to comply and appear at the depositions on account of illness of both counsel and clients. However, Lewis never sought to postpone the depositions or seek a protective order from the court despite the fact that Lewis knew in advance his clients would not appear. Instead, Lewis and his clients simply failed to appear at the July, November and December scheduled depositions and now try to justify that failure.

The court also found that Adriana failed to produce documents throughout the litigation. As set out in the facts, Adriana failed to produce any of the ordered documents on several occasions and, at other times, complied only partially with production orders. Adriana again tries to excuse this behavior, basically arguing that the court's orders were in error. Adriana appealed several of the court's discovery orders to



this court without success. Disagreement with the court is not an excuse for failing to comply with court orders.

The record clearly supports the district court's findings that Adriana violated several court orders to produce documents and failed to appear at six separate depositions.

Therefore, the main issue in this case is whether the court abused its discretion in finding Adriana's actions warranted a default judgment.

Initially, Adriana argues that all of the misconduct outlined above cannot be considered as a whole in determining whether the sanctions were proper. In evaluating the propriety of sanctions, we look at all incidents or a party's misconduct. See, e.g., *Kahaluu*, 857 F.2d at 601-602 (court looked to five separate acts of discovery misconduct in deciding sanctions motion). A court may consider prior misconduct when weighing a subsequent sanction motion. *Halaco*, 843 F.2d at 381, n.2. Therefore, the district court



properly considered all of Adriana's discovery conduct in deciding Thoeren's motion for default.

Adriana cites to *United States v. National Medical Enterprises, Inc.*, 792 F.2d 906 (9th Cir.1986), in support of its argument. In that case, we held that the district court erred in considering three incidents of misconduct together in ordering dismissal. However, in *National Medical Enterprises*, the third incident that precipitated the dismissal (improper communication with the judge) was in a different context than the first two (discover abuses). *Id.* at 913. Because the third incident was different in kind, the district court was not allowed to consider all three actions together for the purposes of dismissal. Here, however, all the misconduct is of the same type: discovery abuses. Therefore, *National Medical Enterprises* is inapplicable and the district court correctly considered all of Adriana's discovery conduct.



B. *Legal Basis for the Default Sanction*<sup>4</sup>

We have identified five factors that a district court must consider before dismissing a case or declaring a default:

- (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the other party; (4) the public policy favoring the disposition of cases on their merits; and (5) the availability of less drastic sanctions.

*Malone v. United States Postal Services*, 833 F.2d 128, 130 (9th Cir.1987), cert. denied sub nom *Malone v. Frank*, 488 U.S. 819, 109 S.Ct.

<sup>4</sup> Although this case involves only a Rule 37 default, we have held that dismissal sanctions under rule 37 and a court's inherent powers are similar. We, therefore, use cases involving dismissal under Rule 37 and inherent powers interchangeably. See *Kahaluu*, 857 F.2d at 603, n.5. Further, cases involving a dismissal of plaintiff's complaint as a sanction are comparable to those involving dismissal of a defendant's answer. *Id.* Therefore, we use both types of cases in analyzing the court's dismissal of Adriana International Corporation's complaint and Adriana's answer to the cross-claims.



59, 102 L.Ed.2d 37 (1988) (quoting *Thompson v. Housing Authority*, 782 F.2d 829, 831 (9th Cir.), cert. denied, 479 U.S. 829, 107 S.Ct. 112, 93 L.Ed.2d 60 (1986)). See also *Wanderer v. Johnston*, 910 F.2d 652, 655-56 (9th Cir. 1990).<sup>5</sup> If the district court fails to make explicit findings regarding each of these factors, the appellate court must review the record independently to determine whether the dismissal was an abuse of discretion. *Malone*, 833 F.2d at 130.

Where a court order is violated, the first two factors support sanctions and the fourth factor cuts against a default. Therefore, it is the third and fifth factors that are decisive.

A defendant suffers prejudice if the

---

5 In addition, in order to warrant a sanction of dismissal, the party's violations of the court's orders must be due to willfulness or bad faith. *Wyle v. R. J. Reynolds Industries, Inc.*, 709 F.2d 585, 589 (9th Cir.1983). The district court found Adriana's actions here to be willful, and Adriana does not dispute this finding.



plaintiff's actions impair the defendant's ability to go to trial or threaten to interfere with the rightful decision of the case. *Id.* at 131. Delay alone has been held to be insufficient prejudice. See *Kahaluu*, 857 F.2d at 604. Failure to produce documents as ordered, however, is considered sufficient prejudice. *Securities and Exchange Comm'n v. Seaboard Corp.*, 666 F.2d 414, 417 (9th Cir.1982).

Here, the repeated failure of Adriana to appear at scheduled dispositions compounded by their continuing refusal to comply with court-ordered production of documents constitutes an interference with the rightful decision of the case. Therefore, prejudice has been established under Malone.

The fifth factor of the Malone test is violated if dismissal is imposed without first considering the impact of the sanction and the adequacy of less drastic sanctions. *Malone*, 833 F.2d at 131. This court conducts a three-part analysis when determining whether a



district court has properly considered the adequacy of less drastic sanctions: (1) did the Court explicitly discuss the feasibility of less drastic sanctions and explain why alternative sanctions would be inappropriate, (2) did the court implement alternative sanctions before ordering dismissal, and (3) did the court warn the party of the possibility of dismissal before actually ordering dismissal? *Malone*, 833 F.2d at 132. In this case, the district court did not explicitly discuss the feasibility of alternative sanctions. Generally, a court must consider less alternative sanctions and discuss them before actually dismissing the case. *Kahaluu*, 857 F.2d at 604. However, in egregious cases where the court actually imposes alternative sanctions before default, such an inquiry is not necessary. *Malone*, 833 F.2d at 132.

Here, the court imposed the following sanctions prior to dismissal: monetary sanctions for filing a frivolous motion, for



failure to comply with Local Rule 6, for failure to produce documents, and for failure to pay earlier sanctions. Additionally, the court also found Lewis in contempt for failing to pay the sanctions. Adriana continually disobeyed court orders and acted in willful disruption of the discovery process. Adriana had not complied with past sanctions, and the court had no reason to believe they would in the future. Therefore, the court satisfied the consideration of alternatives requirement here by imposing various other sanctions before dismissal. See *id.*

As set out above, the district court did impose alternative sanctions before dismissing the case, thus satisfying the second prong of the test to determine whether a district court has imposed alternatives to dismissal.

The last part of the test looks to whether the district court warned of the possibility of dismissal. *Malone*, 833 F.2d at 132. Adriana claims that, in order for a warning to be adequate under *Malone*, the warning must



identify the specific conduct which will trigger the sanction and must identify the specific sanction the court is contemplating. In this case, the court did identify the specific conduct by the plaintiffs that would trigger the sanction. The court stated that if Zade and Kunz failed to appear for the scheduled deposition in December of 1987, "the complaint will be dismissed." This satisfies the requirement that the court identify the party's action that will lead to the sanction. See *In re Rubin*, 769 F.2d 611, 618 n.7 (9th Cir. 1985).

Adriana also argues that the district court was required to give notice of the specific sanction it was contemplating. Here, the judge warned only of a dismissal, not a default. We have held that an explicit warning is not always necessary. *Kahaluu*, 857 F.2d at 605. See *Malone*, 833 F2d at 133 (no explicit warning necessary where harsh sanction of dismissal should not have



surprised plaintiff who willfully violated court's order).

As in *Malone*, Adriana should not have been surprised that Zade's and Kunz' repeated failure to appear for a deposition would result not only in the dismissal of Adriana's complaint but also in the entry of a default judgment in the case to which Zade and Kunz were parties. Further, Adriana was warned twice by the judge that their discovery conduct was improper. Finally, the court's order on October 28, 1986 warned that a failure to comply with the local rules may result in dismissal. In light of these various warnings, the court provided sufficient notice under *Malone*.

The five-part test announced in *Malone* is viewed as a balancing test. See, e.g., *Kahaluu*, 857 F.2d at 603. In this case, the first three factors weigh in favor of sanctions, dismissal and default. See *Wanderer*, at 656. The fifth factor, consideration of alternatives, also weighs in



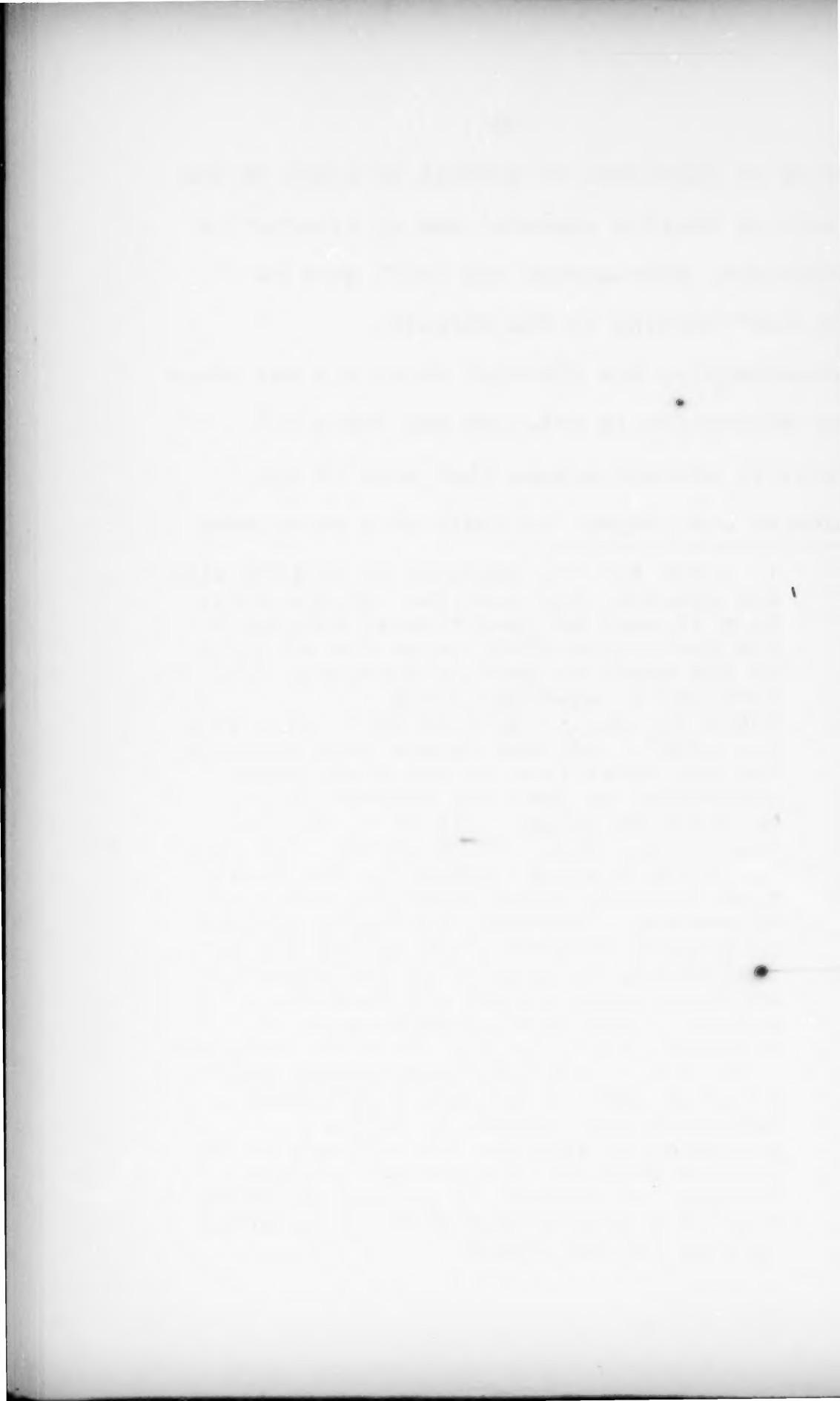
favor of dismissal or default in light of the district court's repeated use of alternative sanctions, even though the court gave no explicit warning of the default.

Consequently, the district court did not abuse its discretion in entering the default.<sup>6</sup>

Finally, Adriana argues that even if the default was proper, it could only be entered

<sup>6</sup> In order for the sanction to comport with due process, the sanction imposed under Rule 37 must be specifically related to the particular claim which was at issue in the order to provide discover.

*Fjelstad v. American Honda Motor Co. Inc.*, 762 F.2d 1334, 1342 (9th Cir.1985). Adriana raises this argument for the first time in its reply brief. Therefore, we need not address the relatedness issue. *Miller v. Fairchild Industries, Inc.*, 797 F.2d 727, 738 (9th Cir.1986) (issues raised for the first time in reply brief generally not addressed). However, Adriana's failure to produce documents and appear for depositions is related to the court's striking their answer and entering a default. See *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 530 (1909) (striking answer and entering default against a corporate defendant who refused to produce documents or permits its officers to be deposed does not violate due process because its refusal to produce evidence created a presumption that its asserted defense was meritless).



against those individuals who themselves engaged in misconduct. Even assuming Adriana's theory is correct, Zade, Kunz and Midgen "participated" in misconduct in this case through their involvement with Adriana Corporation. Zade and Kunz failed to appear at depositions in July and December.

Adriana Corp. failed to produce documents throughout the litigation. Further, Lewis failed to comply with Local Rule 6 in this case as well as various court orders to compel discovery relating to the cross-claims against Midgen, Zade, Kunz and Adriana Corp. Lewis' misconduct can be imputed to all his clients. See *Hamilton Copper & Steel Corp. v. Primary Steel, Inc.*, 898 F.2d 1428, 1431, n. 2 (9th Cir.1990). Adriana's argument that misconduct by one party cannot be grounds for sanctioning an "innocent" party fails because none of the parties in the case are "innocent".

### III. Damages

Adriana contends it was entitled to a jury



trial on the issue of damages.<sup>7</sup> However, after a default judgment has been entered under Fed.R.Civ.P. 37(b)(2), a party has no right to jury trial under either Fed.R.Civ.P. 55(b)(2), which authorizes a district court to hold an evidentiary hearing to determine the amount of damages, or the Seventh Amendment. *Henry v. Sneiders*, 490 F.2d 315, 318 (9th Cir.), cert. denied, 419 U.S. 832, 95 S.Ct. 55, 42 L.Ed.2d 57 (1974).

Adriana also argues that the district court erred in not entering findings of fact pursuant to Fed.R.Civ.P. 52. Rule 52 requires findings of fact to be entered "in all actions tried upon the facts without a jury or with an advisory jury...." However, a default

<sup>7</sup> Adriana also contends that the district court did not have jurisdiction to award damages based on Thoeren's cross-claims. Thoeren's claims included a federal copyright infringement claim under 17 U.S.C. Sec. 501, et seq., which conferred jurisdiction on the district court pursuant to 28 U.S.C. Sec. 1331. Therefore, the court properly exercised pendent jurisdiction over Thoeren's other state law claims under 28 U.S.C. Sec. 1441(c).



judgment generally precludes a trial of the facts except as to damages. *Brown v. Kenron Aluminum & Glass Corp.*, 477 F.2d 526, 531 (8th Cir. 1973). Therefore, Rule 52 is inapplicable except as to damages. *Id.* Consequently, the trial judge's failure to issue findings of fact regarding Adriana's liability was not in error. See *id.* Adriana next argues that the district court erred in excluding several pieces of evidence during the damages hearing. We find no abuse of discretion in the trial judge's rulings. The evidence excluded related to the liability of Adriana, an issue that became irrelevant once the default judgment was entered. See *Geddes v. United Financial Group*, 559 F.2d 557, 560 (9th Cir.1977) (general rule is that upon default, allegations of complaint are accepted as true except as to damages). Lastly, Adriana seems to contend that there was insufficient evidence to support the award of damages in this case. Adriana's basic argument is that the judge improperly awarded

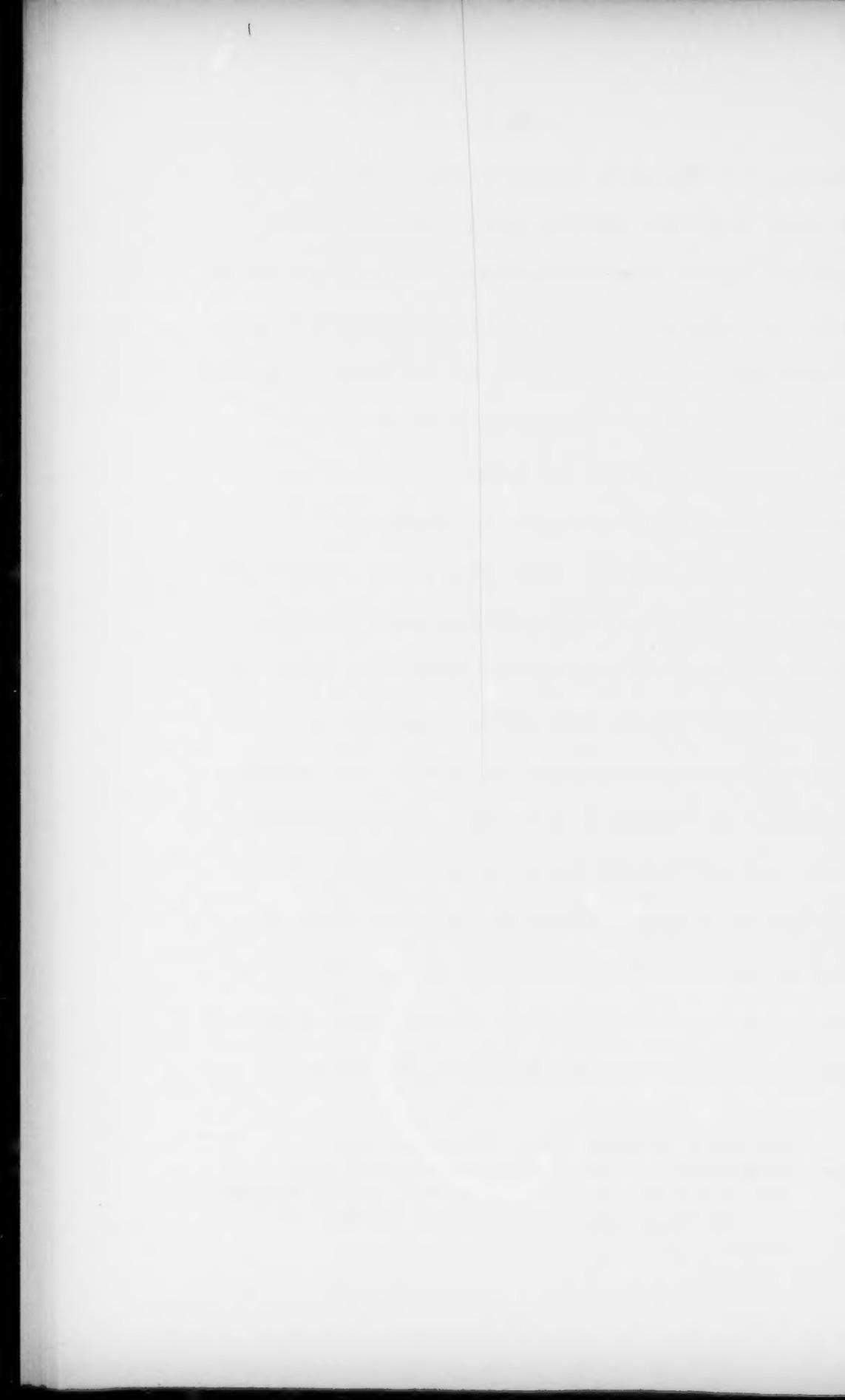
1

1

damages to Thoeren because the liability of Adriana was not sufficiently established. Adriana again misunderstands the effect of a default judgment. The default conclusively establishes the liability of Adriana. Geddes, 449 F.2d at 560. Therefore, there was sufficient evidence to support the trial court's award of damages to Thoeren.<sup>8</sup> Adriana also argues that the court erred in awarding punitive damages against Adriana International Corporation, Zade and Kunz because the court prevented them from presenting any evidence of their net worth. However, the record does not show any offer of proof of net worth to be admitted at the default hearing. Because neither Adriana Corp., Zade or Kunz offered to put their net worth into evidence, they cannot now complain that the district court erred in refusing to

---

<sup>8</sup> Adriana argues that Thoeren was improperly awarded damages for his defamation claim. However, no damages for defamation were given by the trial court.



admit such evidence.

The district court awarded \$1 million in punitive damages against Adriana International Corporation, and \$750,000 apiece against Zade and Kunz. The court had sufficient evidence of the net worth of Adriana, Zade and Kunz from the declarations of Thoeren, Zade and Kunz to determine the appropriate amount of punitive damages. See *Professional Seminar consultants, Inc. v. Sino American Technology Exchange Council, Inc.*, 727 F.2d 1470, 1473 (9th Cir.1984). In light of the amount of compensatory damages awarded and Adriana's egregious conduct, the district court did not abuse its discretion in fixing punitive damages at this level. *Id.*

Adriana also argues that emotional distress damages are not available as a damage for fraud; and were awarded to Thoeren in error. Thoeren was awarded \$200,000 in emotional distress damages against Zade, Kunz and Midgen on his third claim for relief for fraud. Thoeren's third claim for relief alleged that



Zade, Kunz and Midgen entered into the contract without any intention to perform the agreement. This cause of action of fraud is governed by Cal.Civ.Code Sec. 3343. This statute allows recovery for ordinary consequential damages and does not authorize an award of damages for emotional distress. *O'Neil v. Spillane*, 45 Cal.App.3d, 147, 159, 119 Cal.Rptr. 245 (1975). Thus, the award of \$200,000 to Thoeren for emotional distress was improper.<sup>9</sup>

#### IV. Monetary Sanctions

Prior to the dismissal, the district court sanctioned Lewis for filing frivolous motions

---

<sup>9</sup> Adriana also contends that the district court's use of findings prepared by Thoeren's counsel invalidates the court's orders. However, although the practice of a prevailing party preparing findings is discouraged in this circuit, it is not objectionable as long as the findings are supported by the record. *Kern Oil & Refining Co. v. Tenneco Oil Co.*, 840 F.2d 730, 734 (9th Cir.), cert. denied, 488 U.S. 948, 109 S.Ct. 378, 102 L.Ed.2d 367 (1988). Because the findings are supported by the record in this case, the fact that Thoeren prepared the court's findings is of no consequence.

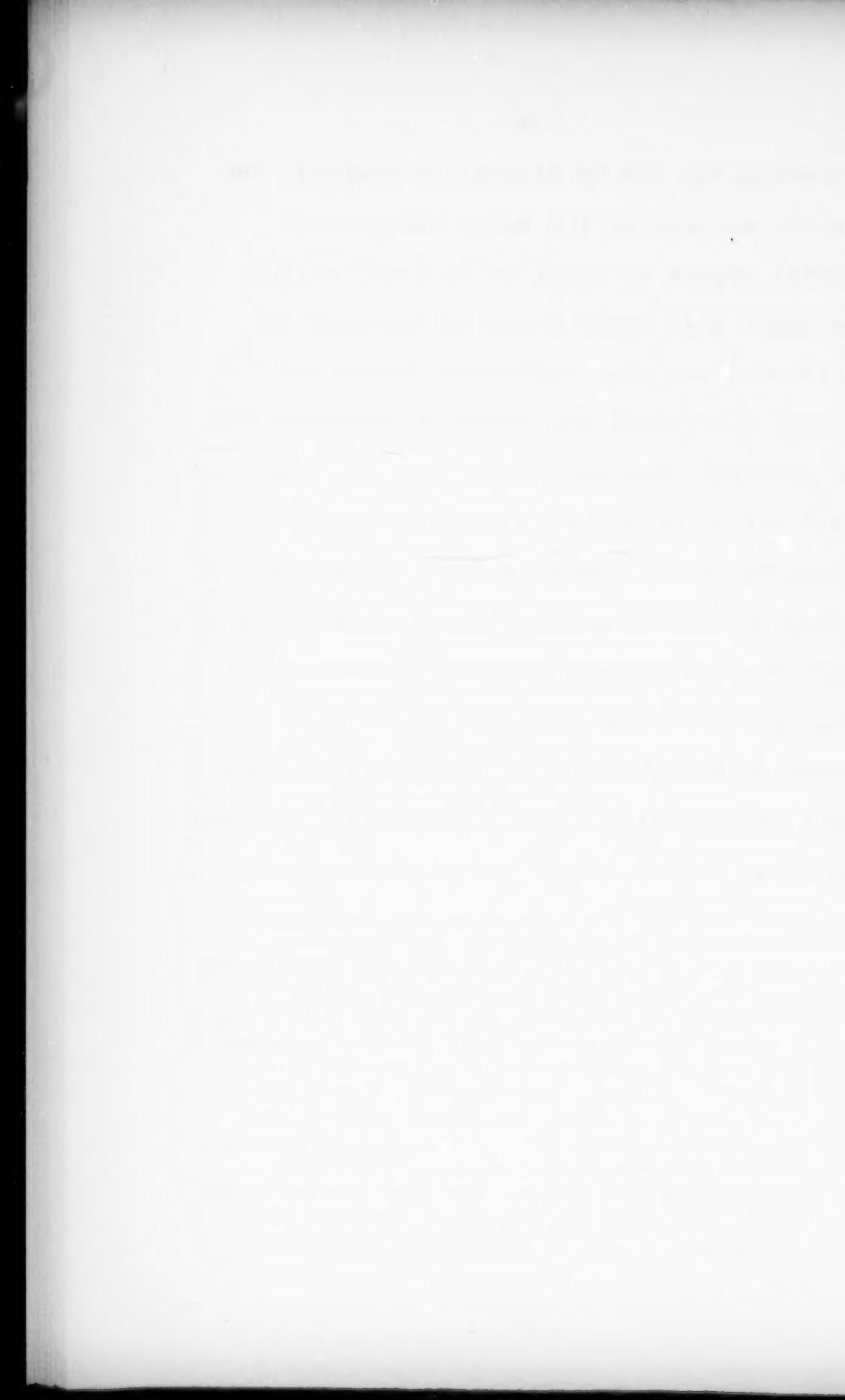


to reconsider and to disqualify counsel, and failing to join in the early meeting of counsel report as required by Local Rule 6. The court also found Lewis in contempt for failing to pay the sanctions. Lewis and Adriana now appeal the award of sanctions and the contempt finding.<sup>10</sup>

Fed.R.Civ.P. 11 allows a court to award sanctions where a party makes a frivolous filing or where a party files a pleading or paper for an improper purpose. *Greenberg v. Sala*, 822 F.2d 882, 885 (9th Cir.1987). A filing is frivolous if no competent attorney would believe it was well-grounded in fact and warranted by law. *Id.* Lewis was sanctioned for both the motion to reconsider and the

---

<sup>10</sup> The sanctions were awarded against Lewis and his clients. Therefore, Lewis remains in the case as an intervenor to appeal the grant of sanctions. Because plaintiffs can be held accountable for Lewis' conduct, see *Malone*, 833 F.2d at 134, this section analyzes the appropriateness of the sanctions against Lewis and Adriana together. If the sanctions are proper against Lewis, then they can also be enforced against his clients.



motion to disqualify counsel because the district court found them to be frivolous.<sup>11</sup> We review all aspects of a district court's Rule 11 determination for abuse of discretion. *Cooter & Gell*, 110 S.Ct. at 2461. Lewis argues the sanctions were improper because Judge Real should have been disqualified because of his ex parte communications with the special master. However, this argument was not presented in their opening brief. Therefore, we do not

---

<sup>11</sup> Lewis raises several arguments in his reply brief, including the constitutionality of the special master's appointment. However, Lewis' brief was to address only those issues relating to the Rule 11 sanctions imposed against him. The special master imposed none of the monetary sanctions at issue on appeal. Thus, Lewis' arguments regarding the special master are irrelevant.

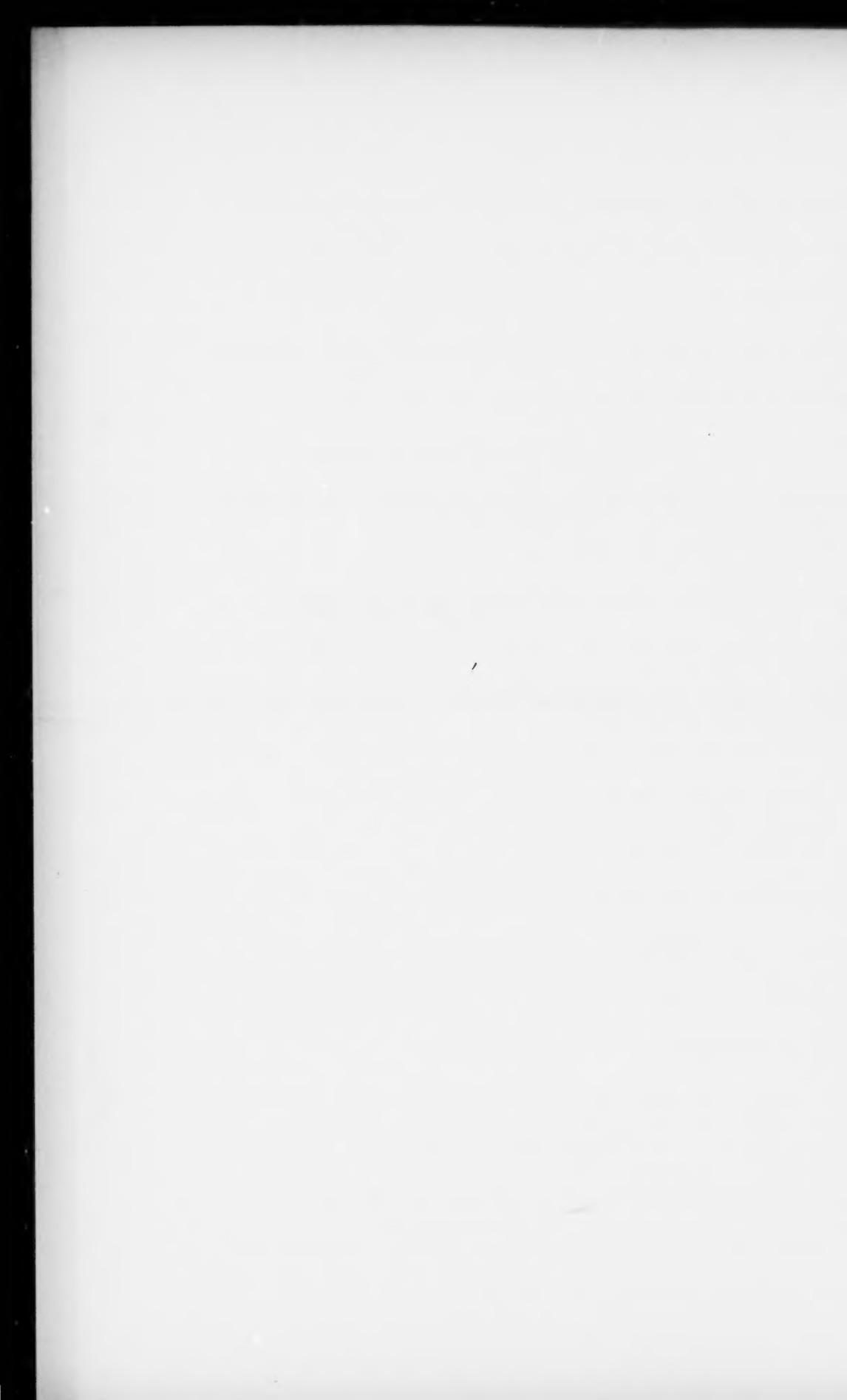
Lewis' other arguments regarding the default judgment, the *Kordich* case, the motion for substitution, the performance by Adriana's new counsel, and personal jurisdiction over AFP are all outside the scope of Lewis' reply brief, which was limited to issues regarding the monetary sanctions imposed against Lewis. Therefore, we do not address the merits of his contentions.



address it on appeal. *Miller v. Fairchild Industries, Inc.*, 797 F.2d 727, 738 (9th Cir.1986).

Lewis also argues that Judge Real should have been disqualified pursuant to 28 U.S.C. Sec. 455(a) because of an alleged financial interest in the case. The Supreme Court has said that Sec. 455(a) is violated if a judge is not recused when a reasonable person, knowing the relevant facts, would expect that a judge knew of circumstances creating an appearance of partiality. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860-61, 108 S.Ct. 2194, 2202-03, 100 L.Ed.2d 855 (1988) (quoting *Health Services Acquisition Corp. v. Liljeberg*, 796 F.2d 796, 802 (5th Cir.1986)).

Lewis presents no facts that create an appearance of partiality in this case. Lewis argues that Judge Real was biased because of a financially beneficial relationship between the special master and Judge Real. However, Lewis offers no objective proof of this



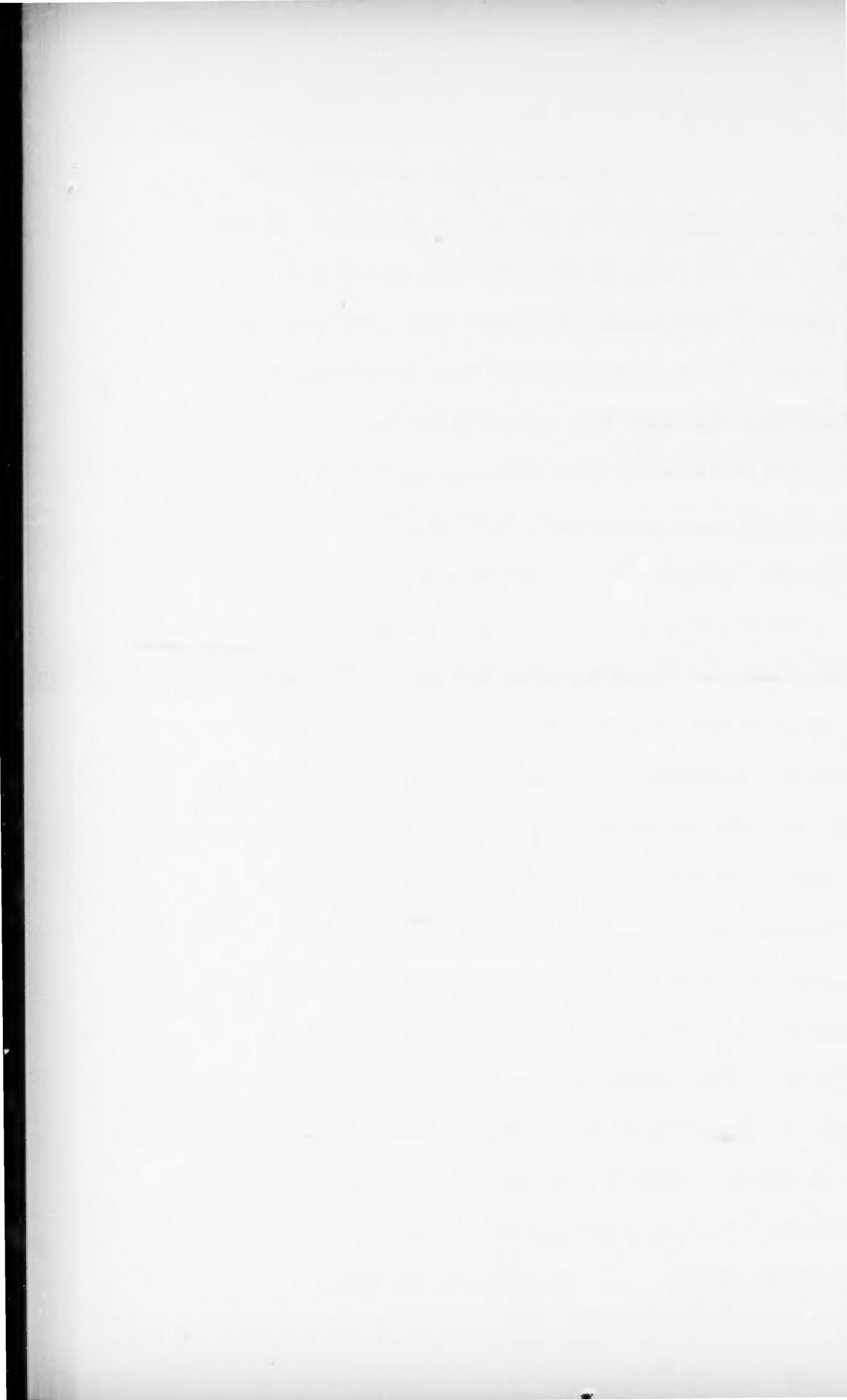
relationship. The district court correctly denied this motion to disqualify Judge Real. Therefore, it did not violate Sec. 455(a) for Judge Real to remain on this case. Consequently, Judge Real had authority to issue discovery orders in this case.

The district court also imposed sanctions for Lewis' motion to disqualify Thoeren's attorney. The essence of Lewis' motion to disqualify Thoeren's attorney was that Thoeren's attorney had a conflict of interest because he had represented Adriana as well. However, Lewis offered no facts showing an attorney-client relationship except that Thoeren's attorney attended a meeting of Adriana two weeks after Thoeren resigned from Adriana and sent a settlement letter to Adriana. This evidence does not show that Thoeren's attorney ever represented Adriana. Therefore, the district court did not abuse its discretion in imposing sanctions for the motion to disqualify.

Lewis was also sanctioned for bringing a



frivolous motion to reconsider the amended judgment. Thoeren filed a Fed.R.Civ.P. 60(a) motion to correct errors in the original judgment. The amended order was entered on April 29, 1988. Adriana filed a motion to reconsider on May 13, after the ten day time limit to file such motions established by Rule 59(e) had expired. Adriana's substantive position raised no new evidence or issues of law. Thus, the court did not abuse its discretion in finding the motion frivolous. The amount of the sanction is reviewed for an abuse of discretion. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 238 (9th Cir.1986). The judge awarded \$2,300 for the motion to reconsider and \$4,955 for the motion to disqualify based on the attorney's fees incurred by Thoeren in opposing these motions. The court's award of sanctions, based on Thoeren's attorney's fees, was appropriate. Fed.R.Civ.P. 11 ("an appropriate sanction ... may include an order to pay to the other party ... the amount of the



reasonable expenses incurred because of the filing of the (abusive) pleading ... including a reasonable attorney's fee.")

Lewis was also sanctioned \$990 for violating Local Rule 6, which requires counsel to meet early in the litigation. As the chronology indicates, Lewis failed to comply with this rule by not showing up at the scheduled meetings and failing to sign the Local Rule 6 statement. Lewis does not dispute that the court had the authority to enter this sanction under the local rules; rather, he argues that he did not violate the rule.<sup>12</sup> However, the district judge's conclusion that Lewis did violate the rule is supported by the record and, thus, the sanction was not an abuse of discretion.

---

12 In the reply brief, Lewis argues that the sanctions for the local rule violations were improper because no bad faith was shown and the sanction was excessive. However, we do not address this argument because it was raised for the first time in the reply brief. *Miller v. Fairchild Industries, Inc.*, 797 F.2d 727, 738 (9th Cir.1986) (issues raised for first time in reply brief will not be addressed).



The court also found Lewis in contempt for failure to obey the court's orders of March 16 and 24 to pay sanctions to Thoeren. Lewis clearly violated the court's orders by refusing to pay the sanctions. The contempt citation was proper.

V. Additional Sanctions

Thoeren seeks attorney's fees and any other relief this court deems appropriate. Under Fed.R.App.P. 38 this court has discretion to award attorney's fees and single or double costs as a sanction for bringing a frivolous appeal. An appeal is considered frivolous if the result is obvious or the appellant's arguments are wholly without merit. *Glanzman v. Uniroyal, Inc.*, 892 F.2d 58, 61 (9th Cir.1989).

The opening briefs in this case are frivolous. The arguments raised by Lewis are rehashings of the facts and present hardly any legal analysis. Because the new attorneys for Adriana substantially improve the arguments in the reply brief, we award attorney's fees and



double costs against appellants and Lewis only, and not Adriana's new counsel.

Further, the opening briefs all use one-and-one half line spacing as opposed to the double spacing required by Fed.R.App.P.Rule 32(a).

28 U.S.C. Sec. 1927 authorizes sanctions for an attorney's failure to comply with our rules governing the form of briefs. See *Hamblen v. County of Los Angeles*, 803 F.2d 462, 464-65 (9th Cir.1986). Therefore, Lewis and Adriana are sanctioned for their failure to comply with Fed.R.App.P. 32(a). A separate order will be filed regarding the determination of the amount of the sanctions on appeal.

#### CONCLUSION

The district court's entry of default was a proper sanction for the outrageous behavior of Adriana in this case. The monetary sanctions were similarly proper. The award of damages is also affirmed except as to the \$200,000 awarded by Thoeren as emotional distress damages for the fraud claim which is reversed. We affirm in part, reverse in part and remand



- 39 -

for the entry of a new judgment that does not include damages for emotional distress.

AFFIRMED IN PART, REVERSED IN PART AND  
REMANDED.



## APPENDIX II

Michael K. Zweig  
SACKS & ZWEIG  
9255 Sunset Boulevard, Suite 620  
Los Angeles, California 90069  
Telephone: (213) 550-6363

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ADRIANA INTERNATIONAL	)	Case No.
CORPORATION,	)	CV-86-6775-R
a California	)	
corporation,	)	ORDER
	)	
Plaintiff	)	
	)	
vs.	)	
	)	
KONSTANTIN THOEREN,	)	
PATROLA FILMS, INC.	)	
a California	)	
corporation, and	)	Date:
PATROLA, G.M.B.H.,	)	March 16, 1987
a Federal Republic	)	Time: 10:00 a.m.
of Germany corporation	)	Courtroom: 8
	)	
Defendants.	)	
	)	
AND RELATED CROSS-ACTION	)	
	)	

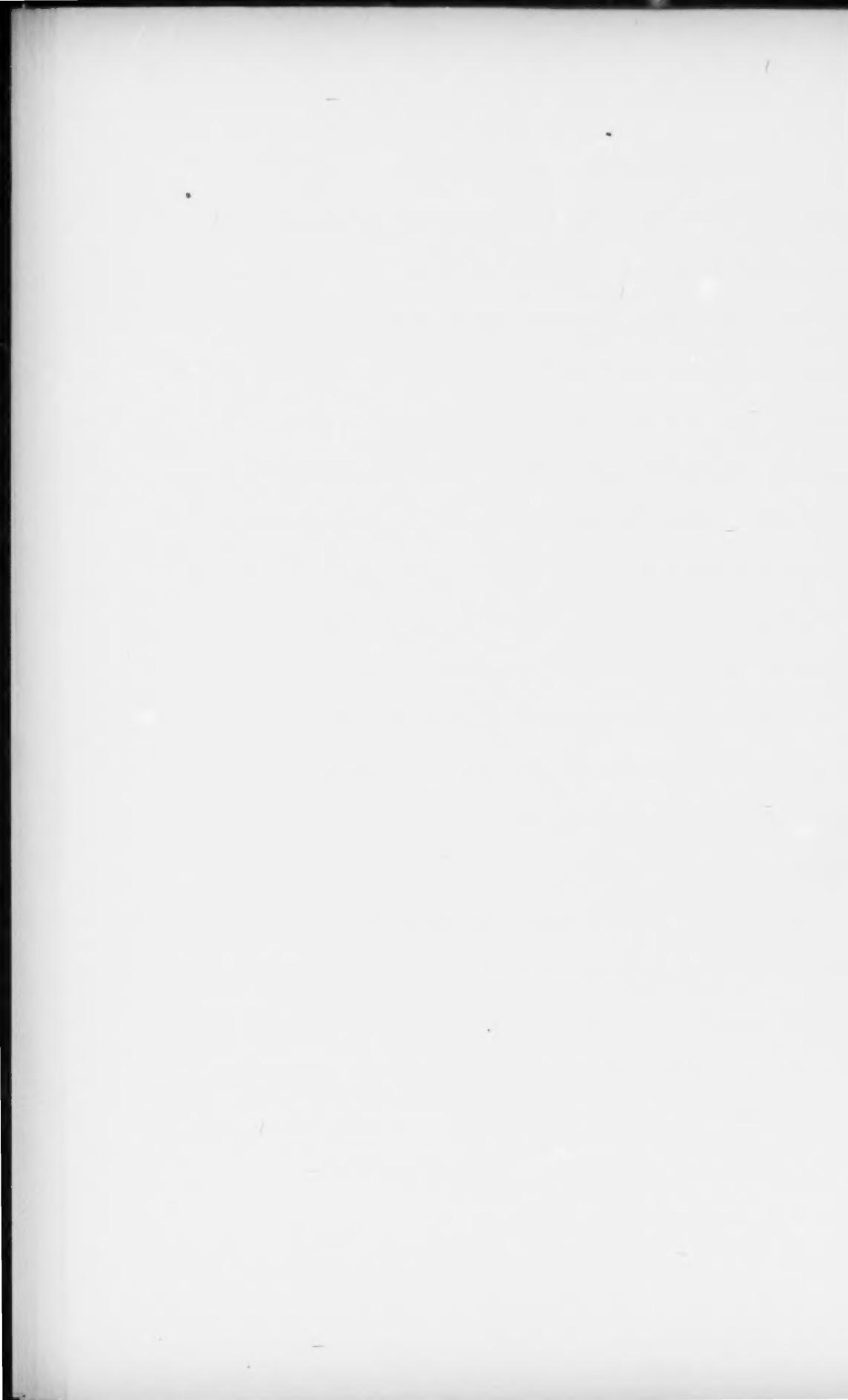


11

Plaintiff's Motion for Disqualification and Defendants' Request for Sanctions Against Plaintiff and Plaintiff's Counsel (In Conjunction With Order To Show Cause Re Dismissal and Plaintiff's Motion For Disqualification) came on regularly for hearing on March 16, 1987, before Chief District Judge Manuel L. Real in Courtroom 8 of the above-entitled Court. Michael K. Zweig of Sacks & Zweig appeared on behalf of Defendants Konstantin Thoeren, Patrola Films, Inc. and Patrola, G.M.B.H. F. Burke Lewis and Amy Cassedy of Lewis & Company appeared on behalf of Plaintiff Adriana International Corp.

THE COURT, having considered the pleadings and evidence submitted in support of and in opposition to the Motions, and upon hearing argument of counsel thereon, ORDERED AS FOLLOWS:

1. Plaintiff's Motion for Disqualification is denied.



2. Pursuant to Defendants' Request  
for Sanctions and the grounds stated therein,  
Plaintiff and Plaintiff's counsel were ordered  
to pay sanctions in the total sum of \$4,955.00  
(based upon 27 hours of attorney time expended  
at the rate of \$165 an hour and ten hours of  
paralegal time at the rate of \$50 an hour),  
due and payable to Defendants' Counsel  
forthwith.

Dated: March 31, 1987 /s/  
Chief Judge  
Manuel L. Real

Submitted by:

SACKS & ZWEIG

By /s/  
Michael K. Zweig  
Attorneys for Defendants,  
Counter-Claimants and Cross-  
Claimants Konstantin Thoeren,  
Patrola Films, Inc. and Patrola,  
G.M.B.H.

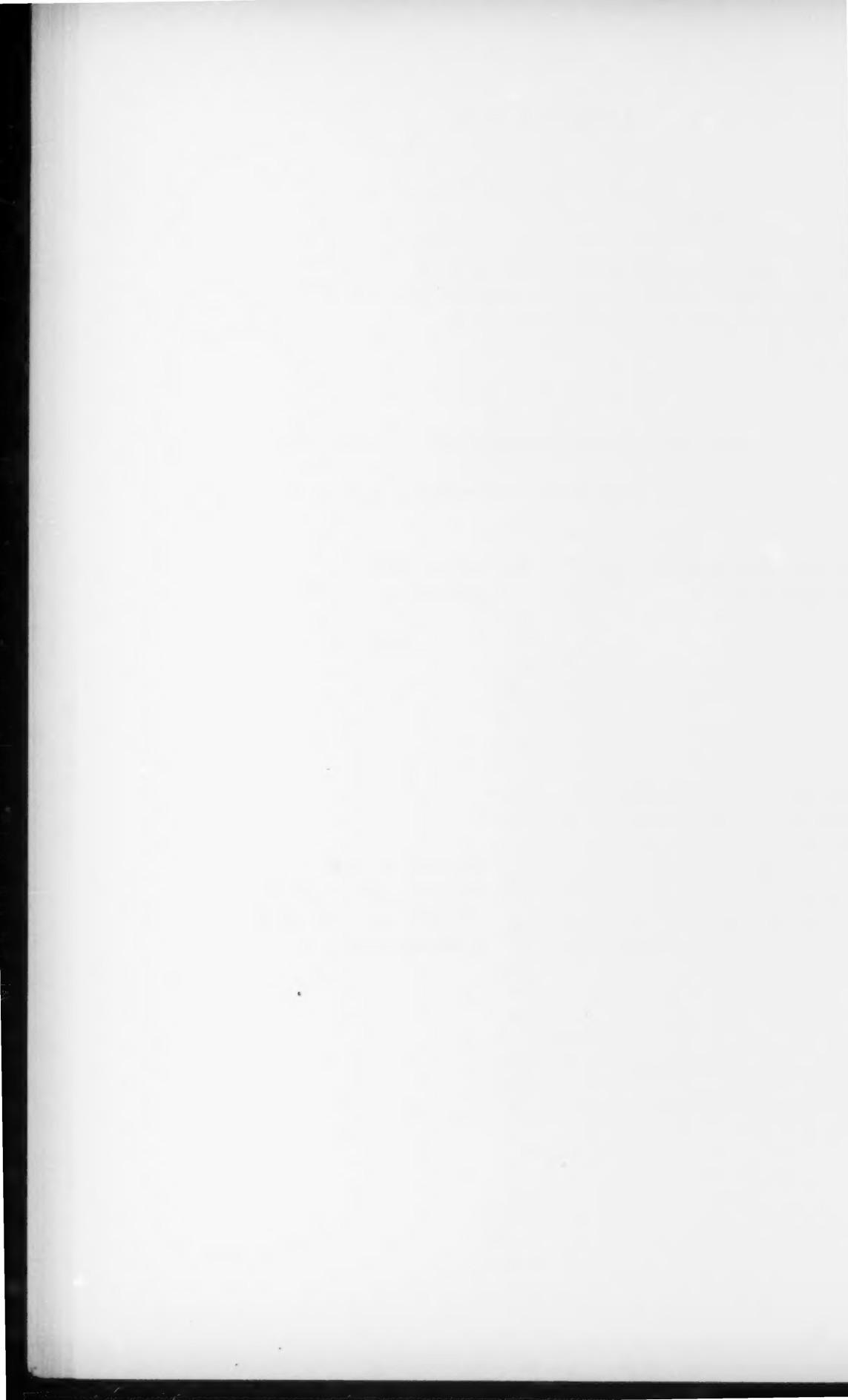


### APPENDIX III

Michael K. Zweig  
SACKS & ZWEIG  
9255 Sunset Boulevard, Suite 620  
Los Angeles, California 90069  
Telephone: (213) 550-6363

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

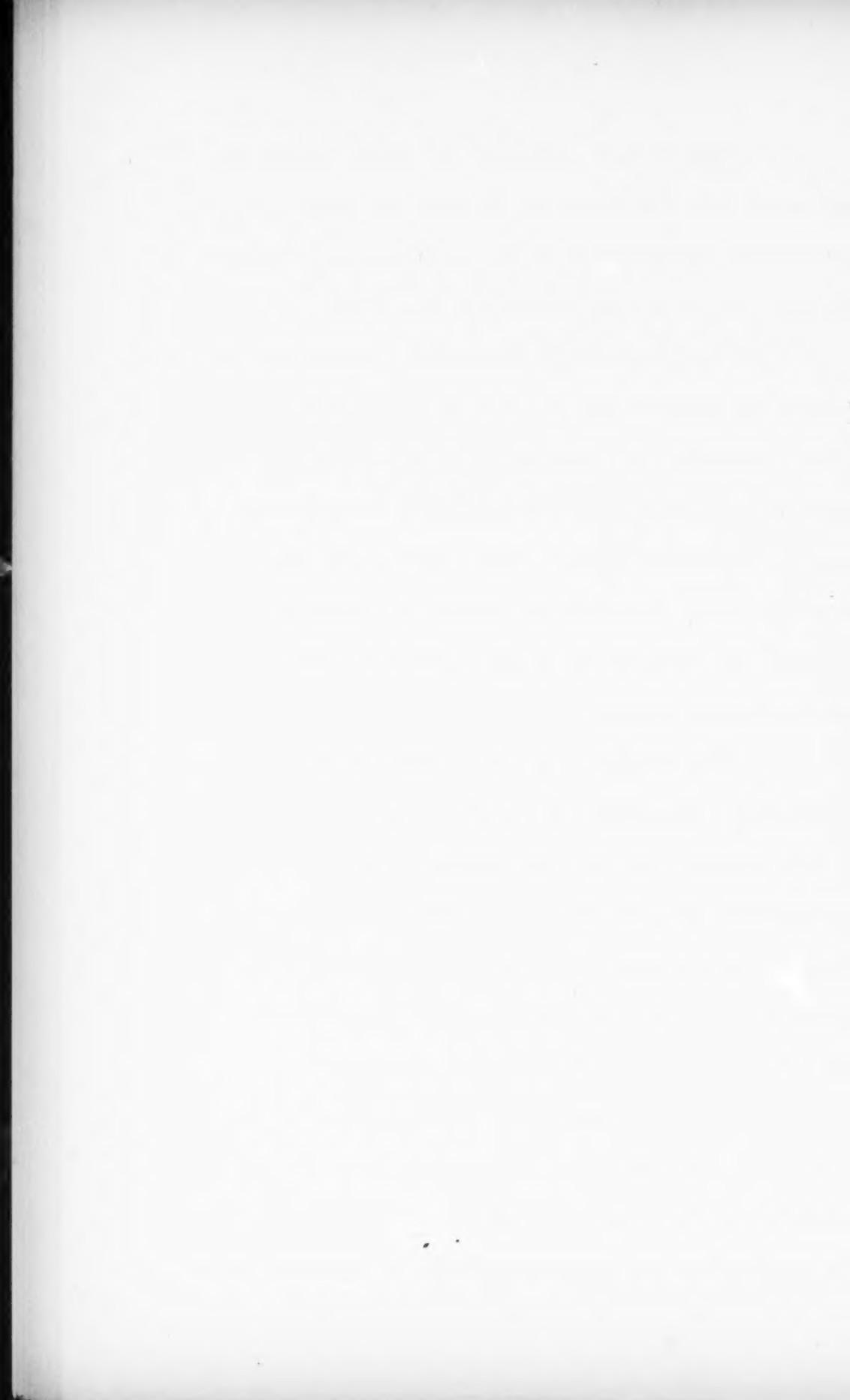
ADRIANA INTERNATIONAL	)	Case No.
CORPORATION,	)	CV-86-6775-R
a California	)	
corporation,	)	ORDER
	)	
Plaintiff	)	
	)	
vs.	)	
	)	
KONSTANTIN THOEREN,	)	
PATROLA FILMS, INC.	)	
a California	)	
corporation, and	)	Date:
PATROLA, G.M.B.H.,	)	March 24, 1987
a Federal Republic	)	Time: 10:00 a.m.
of Germany corporation	)	Courtroom: 6
	)	
Defendants.	)	
	)	
AND RELATED CROSS-ACTION	)	
	)	



The Court's To Show Cause Re  
Dismissal For Failure to Prosecute and  
Defendants' Request for Additional Sanctions  
came on for hearing on March 24, 1987, at  
10:00 a.m. before Chief District Judge Manuel  
L. Real in Courtroom 6 of the above-entitled  
Court. Michael K. Zweig of Sacks & Zweig  
appeared on behalf of Defendants Konstantin  
Thoeren, Patrola Films, Inc. and Patrola,  
G.M.B.H. Amy Cassedy of Lewis & Company  
appeared on behalf of Plaintiff Adriana  
International Corp.

THE COURT, having considered  
Defendants' Request For Additional Sanctions  
and the pleadings and evidence submitted in  
conjunction therewith, and upon hearing  
argument of counsel thereon, including  
argument on Plaintiff's lack of compliance  
with Local Rule 6, ORDERED AS FOLLOWS:

1. Pursuant to Defendants'  
Additional Request For Sanctions and  
Plaintiff's failure to comply with Local  
Rule 6, Plaintiff and Plaintiff's counsel were



ordered to pay sanctions in the total sum of \$990.00 (based upon 6 hours of attorney time expended at the rate of \$165 an hour) due and payable to Defendants' Counsel forthwith.

Dated: March 31, 1987 /s/  
Chief Judge  
Manuel L. Real

Submitted by:

SACKS & ZWEIG

By /s/  
Michael K. Zweig  
Attorneys for Defendants,  
Counter-Claimants and Cross-  
Claimants Konstantin Thoeren,  
Patrola Films, Inc. and Patrola,  
G.M.B.H.



## APPENDIX IV

Michael K. Zweig  
SACKS & ZWEIG  
9255 Sunset Boulevard, Suite 620  
Los Angeles, California 90069  
Telephone: (213) 550-6363

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ADRIANA INTERNATIONAL CORPORATION, a California corporation,	) Case No.
	) CV-86-6775-R
Plaintiff	) ORDER RE SANCTIONS
	) AGAINST PLAINTIFF'S
	) COUNSEL IN
	) CONJUNCTION WITH
vs.	) MOTION RE CONTEMPT
	)
KONSTANTIN THOEREN, PATROLA FILMS, INC. a California corporation, and PATROLA, G.M.B.H., a Federal Republic of Germany corporation	) Date: May 19, 1987
	) Time: 10:00 a.m.
	) Courtroom: 8
	) Trial Date: None
Defendants.	)
AND RELATED CROSS-ACTION	)



Defendants "Motion to Hold Plaintiff and Plaintiff's Counsel In Contempt and Request For Additional Sanctions" ("Motion") came on for hearing before the Honorable United States Chief District Judge Manual L. Real in Courtroom 8 on May 19, 1987 at 1:30 p.m. in the above-referenced action. Michael K. Zweig of Sacks & Zweig appeared on behalf of Defendants Konstantin Thoeren, Patrola Films, Inc. and Patrola G.M.B.H. John Riddet of Aronson & Riddet appeared on behalf of the law offices of L. Burke Lewis, but not on behalf of Plaintiff or Defendants. Arthur Martin and Amy Cassedy of the Law Offices of L. Burke Lewis appeared on behalf of Plaintiff Adriana International Corporation.

Upon consideration of all of the papers submitted in support of and in opposition to the Motion, and upon hearing oral argument thereon, and good cause appearing,

IT IS ORDERED that Defendants' Motion is granted; based upon the refusal of



Plaintiff and Plaintiff's counsel, Law Office of L. Burke Lewis, to obey this Court's oral Orders of March 16, 1987 and March 24, 1987 and the written orders of March 31, 1977 memorializing same, to pay sanctions to Defendants in the amounts of \$4,995.00 and \$990.00 "forthwith", Plaintiff and Plaintiff's counsel were in contempt of this Court until payment of such sanctions was made on May 6, 1987.

IT IS FURTHER ORDERED, based on the foregoing, and based upon the Declarations of Michael K. Zweig submitted in conjunction with the Defendants' Motion and based upon his representations in Court, that sanctions are ordered in conjunction with the Motion in the amount of \$2,520.00 in favor of Defendants and against Plaintiff's counsel, Law Offices of L. Burke Lewis, to be paid by Plaintiff's counsel, which sanctions are not due or payable until adjudication of this action by this Court.



Dated: June 4, 1987

/s/

Manuel L. Real  
United States Chief  
District Judge

Submitted by:

SACKS & ZWEIG

By /s/

Michael K. Zweig  
Attorneys for Defendants,  
Counter-Claimants and Cross-  
Claimants Konstantin Thoeren,  
Patrola Films, Inc. and Patrola,  
G.M.B.H.



## APPENDIX V

Michael K. Zweig  
SACKS & ZWEIG  
9255 Sunset Boulevard, Suite 620  
Los Angeles, California 90069  
Telephone: (213) 550-6363

### UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

ADRIANA INTERNATIONAL CORPORATION, a California corporation,	) Case No.
	) CV-86-6775-R
Plaintiff	) ORDER DISMISSING
	) COMPLAINT, STRIKING
	) ANSWERS TO COUNTER-
	) CLAIM AND ENTERING
vs.	) DEFAULT THEREON,
	) AND AWARDING
KONSTANTIN THOEREN, PATROLA FILMS, INC. a California corporation, and	) MONETARY SANCTIONS
PATROLA, G.M.B.H., a Federal Republic of Germany corporation	) [F.R.C.P. Rule 37]
Defendants.	) Date: February 8, 1988
	) Time: 10:00 a.m.
	) Courtroom: 8
AND RELATED CROSS-ACTION	)



The Motion of Defendants, Counter-  
Claimants and Cross-Claimants Konstantin  
Thoeren, Patrola Films, Inc. and Patrola,  
G.M.B.H. (collectively "Thoeren") entitled  
"Motion of Thoeren To Dismiss Complaint;  
Strike Answers And Enter Default On Counter-  
Claims; And Award Monetary Sanctions"  
(hereinafter "Motion") came on for hearing  
before the Honorable Judge Manuel Real in  
Courtroom 8 of the above entitled Court on  
January 11, 1988 at approximately 10:00 a.m.  
L. Burke Lewis and Amy Cassedy of Lewis &  
Company appeared on behalf of Plaintiff and  
Counter-Defendant Adriana International Corp.  
("Plaintiff") and on behalf of Cross-  
Defendants Hans Kunz, A. M. Midgen, Kemal  
Zeinal-Zade and Arian Films Productions  
Limited ("Cross-Defendants"). Michael  
K. Zweig of Sacks & Zweig appeared on behalf  
of Thoeren. The Court, having reviewed and  
considered all of the Memoranda of Points and  
Authorities, Declarations, Exhibits, Motions  
to Strike and other documents submitted in



support of and in opposition to the Motion, heard oral argument thereon, and upon hearing such oral argument, continued the hearing on the Motion to permit Plaintiff and Cross-Defendants to file additional papers related to the Motion. The Motion thereafter came on for hearing again on February 8, 1988 in Courtroom 8 of the above entitled Court before the Honorable Chief Judge Manuel Real at approximately 10:00 a.m. with the same counsel appearing for the same parties.

The Court having considered all of the above referenced papers submitted in support of and in opposition to the Motion, and having reviewed and considered the additional papers filed after the January 11, 1988 hearing both in support of and in opposition to the Motion, and after duly considering oral argument on the Motion both on January 11, 1988 and February 8, 1988, the Court orders as follows:

Pursuant to F.R.C.P.. Rule 37(b) and (d), based upon the willful, persistent and



continuing refusals of Plaintiff and all Cross-Defendants, acting in concert through their joint counsel, Lewis & Company, to produce discovery in this action, to obey the Orders of this Court and to obey the Orders of the Special Master appointed by this Court, as set forth in the Motion, including inter alia, their failure to produce documents as ordered by the court on March 3, 1987 and subsequently by the Special Master, their failure to appear for depositions as ordered by the Special Master on June 23, 1987 for July 7, 8, 9 and 10, 1987, their failure to appear for depositions as ordered by this Court on November 23, 1987 for December 14, 15 and 16, 1987, and their failure to show good cause therefore, their failure to make themselves available for deposition in June 1987 and in making misrepresentations regarding such depositions, and their failure to provide accurate information about the identity of Cross-Defendant Arian Films Productions



Limited to Thoeren as ordered by the Special Master on March 23, 1987,

IT IS ORDERED THAT:

1. Plaintiff's Complaint is dismissed with prejudice.

2. The "First Amended Answer of Cross-Defendants Adriana, Kunz, Zade and Midgen To First Amended Cross-Claim" dated December 9, 1987 is stricken.

3. Default is entered against Adriana International Corp., A. M. Midgen, Hans Kunz, Kemal-Zeinal Zade and Arian Films Productions Limited on Thoeren's "First Amended Cross-Claim" dated August 7, 1987.

4. Monetary sanctions are awarded against the Plaintiff and Cross-Defendants and their counsel, Lewis & Company, jointly and severally, pursuant to FRCP Rule 37(b) for the attorneys' fees and costs incurred by Thoeren in bringing the instant Motion in the total amount of \$6,440.00 [substantiated as follows: Declaration of Michael K. Zweig dated December 21, 1987, paragraph 3 (\$3,650.00)



submitted with the Motion; Declaration of Michael K. Zweig dated January 5, 1988, paragraph 5 (\$1,740.00) submitted with the Reply Brief in conjunction with the Motion; plus six additional hours of Mr. Zweig's time at \$175.00 an hour (\$1,050) for the attendant Court appearances on the Motion on January 11, 1988 and February 8, 1988] in that such Motion was necessitated by the frivolous and dilatory tactics of Plaintiff and Cross-Defendants and their counsel in refusing to provide discovery, and their refusals to comply with the above referenced orders of the Court and the Special Master, which refusals were not substantially justified.

Dated: February 25, 1988 /s/  
Chief District Judge  
Manuel L. Real

Submitted by:  
SACKS & ZWEIG



By /s/  
Michael K. Zweig, Attorneys For  
Defendants, Counter-Claimants  
and Cross-Claimants Konstantin  
Thoeren, Patrola Films, Inc.  
and Patrola, G.M.B.H.®



## APPENDIX VI

Michael K. Zweig  
SACKS & ZWEIG  
9255 Sunset Boulevard, Suite 620  
Los Angeles, California 90069  
Telephone: (213) 550-6363

### UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

ADRIANA INTERNATIONAL	)	Case No.
CORPORATION,	)	CV-86-6775-R
a California	)	ORDER RE
corporation,	)	CROSS-DEFENDANT
Plaintiff	)	ARIAN FILMS
vs.	)	PRODUCTIONS
KONSTANTIN THOEREN,	)	LIMITED'S MOTION
PATROLA FILMS, INC.	)	TO DISMISS FOR LACK
a California	)	OF PERSONAL
corporation, and	)	JURISDICTION
PATROLA, G.M.B.H.,	)	Date:
a Federal Republic	)	February 8, 1988
of Germany corporation	)	Time: 10:00 a.m.
Defendants.	)	Courtroom: 8
AND RELATED CROSS-ACTION	)	



The Motion of Cross-Defendant Arian Films Productions Limited ("AFP") entitled "Motion To Dismiss For Lack Of Personal Jurisdiction" (hereafter "Motion") came on for hearing before the Honorable Chief Judge Manuel Real in Courtroom 8 of the above entitled Court on November 23, 1987 at approximately 10:00 a.m. Amy Cassedy of Lewis & Company appeared on behalf of Cross-Defendant AFP. Michael K. Zweig of Sacks & Zweig appeared on behalf of Cross-Claimants Konstantin Thoeren, Patrola Films, Inc. and Patrola, G.M.B.H. (collectively "Thoeren"). The Court, having reviewed all of the Memoranda of Points and Authorities, Declarations, Exhibits, Motions to Strike and other documents submitted in support of and in opposition to the Motion, and having heard oral argument thereon, continued the hearing on the Motion to January 11, 1988, to be heard after the Court ordered depositions of Hans Kunz ("Kunz") and Kemal Zeinal-Zade ("Zade"), agents of AFP. The Motion thereafter came on



for hearing again on January 11, 1988 with L. Burke Lewis and Amy Cassedy of Lewis & Co. appearing on behalf of AFP, and Michael K. Zweig appearing on behalf of Thoeren, at which time the court noted that Kunz and Zade had refused to appear for their Court ordered depositions and further continued the hearing. The Motion came on for hearing again on February 8, 1988 in Courtroom 8 of the above entitled Court before the Honorable Chief Judge Manuel Real at approximately 10:00 a.m. with L. Burke Lewis and Amy Cassedy appearing for AFP and Michael K. Zweig appearing for Thoeren.

The court having considered all of the above referenced papers submitted in support of an in opposition to the Motion, and the failure of Kunz and Zade to appear for deposition as ordered, and after considering oral argument thereon,

IT IS ORDERED THAT:

Based upon AFP's purposeful, regular and systematic contact with the State of



California, through its representatives, counsel, officers, directors and financiers, including Anthony M. Midgen, Hans Kunz and Kemal Zeinal-Zade, and further based upon the claims alleged against AFP in this action arising out of its contacts with the State of California, including the issuance of stock in Adriana to AFP in California, the holding of said stock in California by counsel for AFP, the assumption of possession of and transference of said stock out of California by counsel for AFP, and the agreement entered into in California and the attendant misrepresentations as alleged by Thoeren regarding AFP holding Adriana stock in trust for Thoeren, personal jurisdiction over AFP herein is established and the Motion is denied.

Dated: February 8, 1988

Chief District Judge  
Manuel L. Real



Submitted by:

SACKS & ZWEIG

By /s/

Michael K. Zweig, Attorneys For  
Defendants, Counter-Claimants  
and Cross-Claimants Konstantin  
Thoeren, Patrola Films, Inc.  
and Patrola, G.M.B.H.



## APPENDIX VII

Michael K. Zweig  
SACKS & ZWEIG  
9255 Sunset Boulevard, Suite 620  
Los Angeles, California 90069  
Telephone: (213) 550-6363

### UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

ADRIANA INTERNATIONAL      ) Case  
CORPORATION                ) No. CV-86-6775-R  
a California corporation )  
                            )  
                            Plaintiff, )  
                            )  
                            v.     )                           ORDER  
                            )  
                            )  
KONSTANTIN THOEREN,        )  
et. al.,                  )  
                            )  
                            Defendants. )  
                            )  
                            )  
                            )

Pursuant to Rule 37(b) and (d) of  
the Federal Rules of Civil Procedure the  
complaint of plaintiff ADRIANA INTERNATIONAL  
CORPORATION was dismissed for willful,  
persistent and continuing obstreperous conduct



by counsel for plaintiff and cross-defendants during the entire course of discovery and for the failure of cross-defendants KEMAL ZEINAL-ZADE and HANS ALBERT KUNZ to appear for their deposition as ordered by the court after repeated failures to appear. The answers of cross-defendants ADRIANA INTERNATIONAL CORPORATION, KEMAL ZEINAL-ZADE, HANS ALBERT KUNZ and ARIAN FILMS PRODUCTIONS LIMITED were stricken and default entered against them.

The Court having received declarations of the liquidated and unliquidated damages suffered by cross-claimant KONSTANTIN THOEREN and having heard cross-examination of KONSTANTIN THOEREN on the unliquidated damage claims.

IT IS ORDERED ADJUDGED AND DECREED:

Cross-claimant KONSTANTIN THOEREN have judgment against ADRIANA INTERNATIONAL CORPORATION, KEMAL ZEINAL-ZADE and HANS ROBERT KUNZ as follows:



1. For breach of contract and fraud in the sum of \$5,120,000 on his 1st claim for relief
2. \$5,120,000 on his 2nd claim for relief for breach of covenant of good faith and fair dealing
3. \$5,120,000 on his 3rd claim for relief for fraud
4. That KONSTANTIN THOEREN is owner of a 30% stock interest in cross-defendant ADRIANA INTERNATIONAL CORPORATION
5. Cross-defendant ADRIANA INTERNATIONAL CORPORATION is ordered to transfer a 30% stock interest to KONSTANTIN THOEREN
6. \$200,000 for emotional distress on his 3rd claim for relief
7. \$1,000,000 punitive damages against cross-defendant ADRIANA INTERNATIONAL CORPORATION



8. \$750,000 punitive damages  
against cross-defendant KEMAL  
ZEINAL-ZADE
9. \$750,000 punitive damages  
against cross-defendant HANS  
ALBERT KUNZ
10. Cost of suit in the amount of  
\$ \_\_\_\_\_.

DATED: April 13, 1988.

/s/ \_\_\_\_\_  
MANUAL L. REAL  
UNITED STATES DISTRICT COURT



## APPENDIX VIII

Michael K. Zweig  
SACKS & ZWEIG  
9255 Sunset Boulevard, Suite 620  
Los Angeles, California 90069  
Telephone: (213) 550-6363

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ADRIANA INTERNATIONAL	)	Case No.
CORPORATION, a	)	
corporation,	)	AMENDED ORDER
)		
Plaintiff	)	
)		
vs.	)	
)		
KONSTANTIN THOEREN,	)	
PATROLA FILMS, INC.	)	
a California	)	
corporation, and	)	
PATROLA, G.M.B.H.,	)	
a Federal Republic	)	
of Germany corporation	)	
)		
Defendants.	)	
_____		
KONSTANTIN THOEREN, as	)	
an individual and as a	)	
shareholder on behalf	)	
of Adriana	)	
International	)	
Corporation,	)	
a California	)	
corporation,	)	



PATROLA FILMS, INC. )  
a California )  
corporation, and )  
PATROLA, G.M.B.H. )  
a Federal Republic )  
of Germany )  
Corporation, )  
 )  
Counter Claimants )  
and Cross-Claimants )  
 )  
vs. )  
 )  
ADRIANA INTERNATIONAL )  
CORPORATION, )  
a California )  
corporation, )  
KEMAL ZEINAL-ZADE, )  
an individual, )  
HAHNS ALBERT KUNTZ, )  
an individual, )  
A. M. MIDGEN, )  
an individual )  
and GIPSON, HOFFMAN )  
& PANCIONE, )  
a California business )  
entity, )  
and ARIAN FILMS )  
PRODUCTIONS LIMITED, )  
a Bahamian Corp. )  
 )  
Counter-Defendant )  
and Cross Defendants )  
 )

---

This Order shall correct and modify  
this Court's prior Order date April 13, 1988  
and entered April 14, 1988 herein, pursuant to  
Federal Rules of Civil Procedure, Rule 60(a).

D

Pursuant to Rules 37(b) and (d) of the Federal Rules of Civil Procedure, the Complaint of Plaintiff ADRIANA INTERNATIONAL CORPORATION was dismissed for willful persistent and continuing obstreperous conduct by counsel for Plaintiff and Cross-Defendants during the entire course of discovery and for failure of Cross-Defendants KEMAL ZEINAL-ZADE and HANS ALBERT KUNZ to appear for their deposition as ordered by the Court after repeated failures to appear. The answers of Cross-Defendants ADRIANA INTERNATIONAL CORPORATION, KEMAL ZEINAL-ZADE, HANS ALBERT KUNZ, A. M. MIDGEN and ARIAN KUNZ, A. M. MIDGEN LIMITED were stricken and default entered against them.

The Court having received declarations from all parties on the liquidated and unliquidated damages suffered by Cross-Claimant KONSTANTIN THOEREN and having hear cross-examination of KONSTANTIN THOEREN on the unliquidated damage claims,

IT IS ORDERED ADJUDGED AND DECREED:



Cross-Claimant KONSTANTIN THOEREN

have judgment against Cross-Defendants as follows:

1. Against ADRIANA INTERNATIONAL CORPORATION, KEMAL ZEINAL-ZADE and HANS ALBERT KUNZ in the sum of \$5,120,000.00 on THOEREN first claim for relief for breach of contract.
2. Against ADRIANA INTERNATIONAL CORPORATION, KEMAL ZEINAL-ZADE and HANS ALBERT KUNZ in the sum of \$5,120,000.00 on THOEREN second claim for relief for breach of the covenant of good faith and fair dealing.
3. Against KEMAL ZEINAL-ZADE, HANS ALBERT KUNZ and ANTHONY M. MIDGEN in the sum of \$5,370,000.00 on THOEREN third claim for relief for fraud.
4. Against ADRIANA INTERNATIONAL CORPORATION, KEMAL ZEINAL-ZADE,



HANS ALBERT KUNZ, ANTHONY M.  
MIDGEN and ARIAN FILMS  
PRODUCTIONS LIMITED that  
KONSTANTIN THOEREN is the owner  
of a 30% stock interest in  
ADRIANA INTERNATIONAL  
CORPORATION.

5. Cross-Defendants ADRIANA INTERNATIONAL CORPORATION and ARIAN FILMS PRODUCTIONS LIMITED are ordered to transfer a 30% stock interest to KONSTANTIN THOEREN.
6. Against KEMAL ZEINAL-ZADE, HANS ALBERT KUNZ and ANTHONY M. MIDGEN in the sum of \$200,000.00 for THOEREN'S emotional distress on Thoeren's third claim for relief for fraud.
7. Against Cross-Defendant ANTHONY M. MIDGEN in the sum of \$165,000.00 on Thoeren's



twelfth claim for relief for  
malpractice.

8. \$1,000,000.00 punitive damages  
against Cross-Defendant ADRIANA  
INTERNATIONAL CORPORATION.
9. \$750,000.00 on punitive damages  
against Cross-Defendant KEMAL  
ZEINAL-ZADE.
10. \$750,000.00 punitive damages  
against Cross Defendant KEMAL  
ZEINAL-ZADE.

~~11. -----~~ \$-t-----  
~~punitive~~  
~~damages-against-Cross-Defendant~~  
~~ANTHONY-M--MIDGEN-~~

12. Against ANTHONY M. MIDGEN and  
in favor of ADRIANA  
INTERNATIONAL CORPORATION based  
on Thoeren's eighth claim for  
relief on behalf of Adriana in  
the sum of \$88,501.00.
13. Against KEMAL ZEINAL-ZADE and  
in favor of ADRIANA  
INTERNATIONAL CORPORATION based



on Thoeren's eighth claim for  
relief on behalf of Adriana in  
the sum of \$30,000.00.

14. Costs of suit ~~in-the-amount-of~~  
\$-----

DATED: April 29, 1988.

/s/  
MANUAL L. REAL  
UNITED STATES DISTRICT COURT

By /s/  
Michael K. Zweig, Attorneys For  
Defendants, Counter-Claimants  
and Cross-Claimants Konstantin  
Thoeren, Patrola Films, Inc.  
and Patrola, G.M.B.H.



## APPENDIX IX

Michael K. Zweig  
SACKS & ZWEIG  
100 Wilshire Building  
100 Wilshire Boulevard, Suite 1300  
Los Angeles, California 90401  
Telephone: (213) 451-3113

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ADRIANA INTERNATIONAL	)	Case
CORPORATION,	)	No. CV-86-6775-R
a California	)	
corporation	)	ORDER
Plaintiff		)
		)
vs.	)	
		)
KONSTANTIN THOEREN,	)	
PATROLA FILMS, INC.	)	
a California	)	
corporation, and	)	
PATROLA, G.M.B.H.,	)	
a Federal	)	
Republic of Germany	)	
corporation	)	
Defendants.		)
		)
AND RELATED CROSS-ACTION		)
		)



The motion Of Konstantin Thoeren, Patrola Films, Inc. and Patrola, G.M.B.H. entitled "Motion of Thoeren for Sanctions Against Plaintiff, Cross-Defendants and Their Attorneys" and the motion Of Cross-Defendants Adriana International Corporation, Kemal Zeinal-Zade, Hans Kunz, Anthony M. Midgen and Adriana Films Productions, Ltd. entitled "Motion For Reconsideration of Amended Order" both came on for hearing before the Honorable Chief Justice Manuel Real in Courtroom 8 of the above-entitled Court at 10:00 a.m. on July 5, 1988. Michael K. Zweig of Sacks & Zweig appeared on behalf of Konstantin Thoeren, Patrola Films, Inc. and Patrola, G.M.B.H. and L. Burke Lewis and Amy Cassedy of Lewis & Company appeared on behalf of Adriana International Corporation, Kemal Zeinal-Zade, Hans Kunz, Anthony M. Midgen and Arian Films Productions Limited.

The Court, having reviewed all of the papers submitted in support of and in



opposition to both of the aforementioned motions, and hearing oral argument thereon,

IT IS ORDERED that Cross-Defendants' Motion For Reconsideration Of Amended Order is denied and Thoeren's Motion For Sanctions Against Plaintiff, Cross-Defendants and Their Attorneys is denied, except that sanctions are hereby ordered, adjudged and decreed against Adriana International Corporation, Kemal Zeinal-Zade, Hans Kunz, Anthony M. Midgen, Arian Films Productions Limited and Lewis & Company, jointly and severally, in the sum of \$2,292.50 consisting of 9.6 attorney hours at \$175.00 per hour, plus 4.0 attorney hours at \$125.00 per hour as set forth in the Declaration of Michael K. Zweig dated July 8, 1988. The sanctions are based upon the findings of this Court that Cross-Defendants' Motion for Reconsideration of Amended Order violated Rule 11 of the Federal Rules of Civil Procedure, was not well grounded in fact or brought in good faith, and totally failed to meet the requirements of Central District



Local Rule 7.16. The aforesaid sanctions are  
payable on or before \_\_\_\_\_, 1988.

DATED: July 26, 1988

/s/

CHIEF DISTRICT JUDGE  
MANUEL REAL

Submitted by:

SACKS & ZWEIG

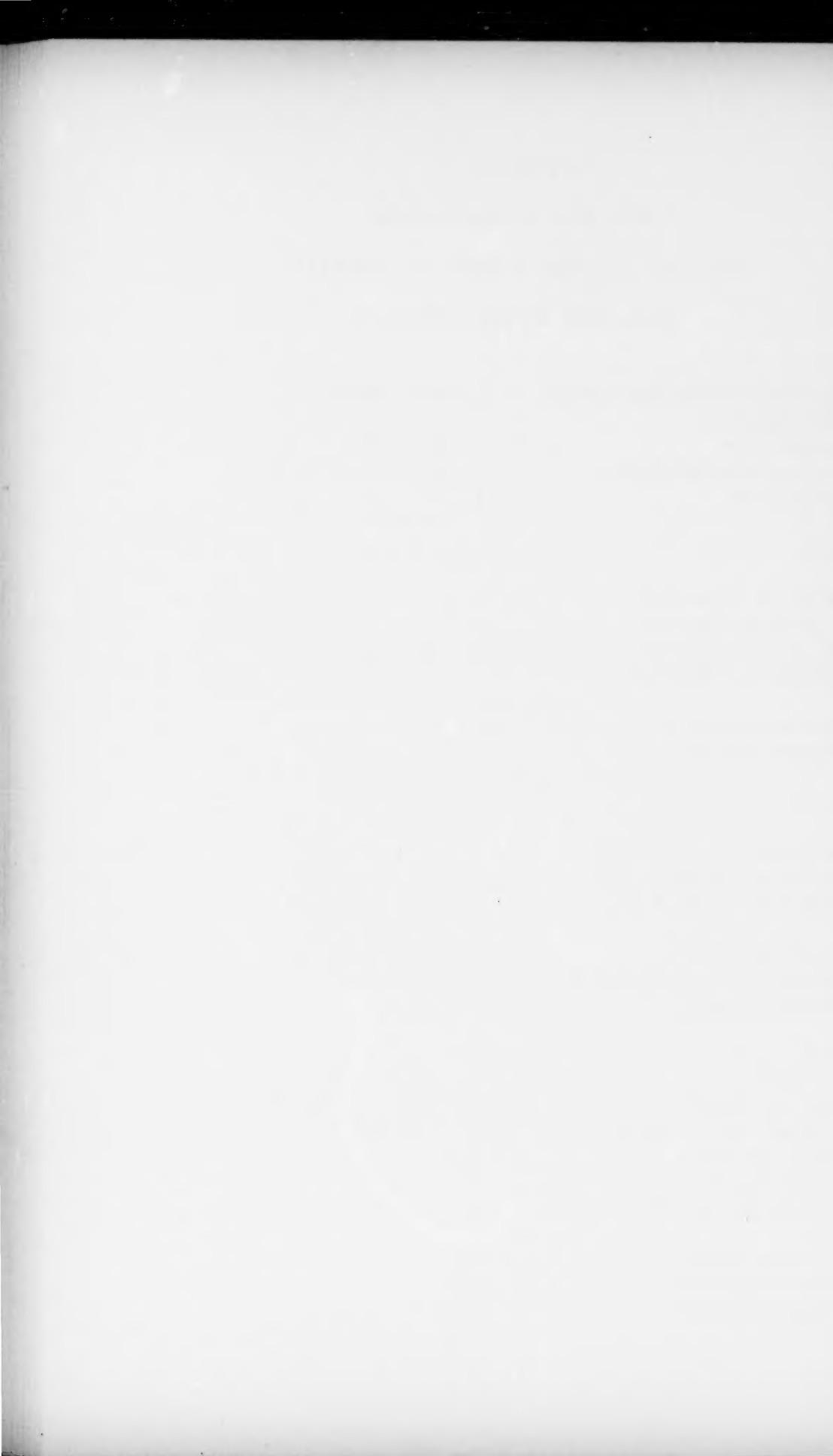
By /s/

Michael K. Zweig  
Attorneys for Konstantin Thoeren,  
Patrola Films, Inc.  
and Patrola, G.M.B.H.



APPENDIX X  
NOT FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

ADRIANA INTERNATIONAL	)	No. 88-6107
CORPORATION	)	
Plaintiff-	)	D.C. No.
counter-defendant-	)	CV-86-6775-R
Appellant	)	
	)	ORDER
vs.	)	
	)	
LEWIS & COMPANY;	)	
L. BURKE LEWIS;	)	
AMY J. CASSEY;	)	
ARTHUR L. MARTIN	)	
	)	
Intervenors-	)	
Appellants	)	
	)	
vs.	)	
	)	
KONSTANTIN THOEREN;	)	
PATROLA FILMS, INC.	)	
PATROLA, G.M.B.H.	)	
	)	
Defendants-	)	
counter-claimants	)	
Appellees	)	
	)	
vs.	)	
	)	
HANS A. KUNZ;	)	
ANTHONY M. MIDGEN;	)	
KEMAL ZEINAL-ZADE;	)	
ARIAN FILMS	)	
PRODUCTIONS LTD.	)	
	)	
Third-party-	)	
defendants-	)	
Appellants	)	



)  
BURKE LEWIS; ) No. 88-6424  
AMY J. CASSEY; )  
ARTHUR PRODUCTIONS, LTD. )  
LEWIS & COMPANY )  
)  
Plaintiff- )  
counter-defendant- )  
cross-defendants- )  
Appellants )  
)  
vs. )  
)  
KONSTANTIN THOEREN, )  
et. al.; )  
PATROLA FILMS, INC.; )  
PATROLA, G.M.B.H. )  
)  
Defendant- )  
counter-claimant- )  
cross-claimant- )  
Appellees )  
)



BEFORE: ALARCON, BRUNETTI, and O'SCANNLAIN,  
Circuit Judges

The motion of Lewis & Company, Lawyers,  
L. Burke Lewis, and Amy J. Cassedy for  
clarification of the October 5, 1990 Order of  
this court is denied.

The order allowing the filling of the  
late petition for rehearing dated  
September 25, 1990, is vacated. The petition  
for rehearing by appellants Adriana  
International Corporation, Arian Films  
Productions, Ltd., Kemal Zeinal-Zade, Hans  
Albert Kunz and Anthony M. Midgen, is denied  
as untimely.<sup>1</sup>

The petition for rehearing and suggestion  
for rehearing en banc by L. Burke Lewis, Amy  
J. Cassedy, and Lewis & Company, Lawyers, is  
denied as untimely.<sup>1</sup>

---

<sup>1</sup> Rule 25, F.R.A.P., states "filing may be accomplished by mailing addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs and appendices shall be deemed filed on the day of mailing . . ." The petitions are not "briefs and appendices" and as such were filed untimely.



The request of appellees, Konstantin Thoeren, Patrola Films, Inc., Patrola G.M.B.H., for attorney's fees and double costs in the sum of \$73,101.00 is granted with joint and several liability assigned to Adriana and Lewis.



## APPENDIX XI

Michael K. Zweig  
SACKS & ZWEIG  
9255 Sunset Boulevard, Suite 620  
Los Angeles, California 90069  
Telephone: (213) 550-6363

### UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ADRIANA INTERNATIONAL	)	Nos. 88-6107
CORPORATION, etc.	)	
Plaintiff-	)	
counter-defendant/	)	
Appellant	)	
vs.	)	DC# CV-86-6775-MLR
	)	Central California
LEWIS & COMPANY,	)	
et. al.,	)	
Intervenors/	)	
Appellants,	)	
KONSTANTIN THOEREN,	)	
et. al.,	)	
Defendants-	)	
counter-claimants/	)	
Appellees	)	
vs.	)	
HANS A. KUNZ, et. al.,	)	
Third-party	)	



No. 88-6107, 88-6424

defendants/ )  
Appellants. )  
\_\_\_\_\_  
)  
BURKE LEWIS, et. al., ) No. 88-6424  
)  
Appellants, ) DC# CV-86-6775-MLR  
and ) Central California  
)  
A. KUNZ, et. al., )  
)  
Plaintiffs- )  
counter-defendants- )  
cross-defendants/ )  
Appellants )  
)  
vs. )  
)  
Defendants- ) ORDER  
counter-claimant- )  
cross-claimants/ )  
Appellees )  
\_\_\_\_\_  
)

Before: NOONAN, Circuit Judge

Appellee's motion to strike appellant's  
briefs is denied. Appellees may file a brief  
of no more than 60 pages on or before  
September 29, 1989.

Appellants may file reply briefs of no  
more than 20 pages each on or before  
October 13, 1989.



## APPENDIX XII

Michael K. Zweig  
SACKS & ZWEIG  
9255 Sunset Boulevard, Suite 620  
Los Angeles, California 90069  
Telephone: (213) 550-6363

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

ADRIANA INTERNATIONAL	)	Nos. 88-6107
CORPORATION, etc.	)	
Plaintiff-	)	
counter-defendant/	)	
Appellant	)	
vs.	)	DC# CV-86-6775-MLR
	)	Central California
LEWIS & COMPANY,	)	
et. al.,	)	
Intervenors/	)	
Appellants,	)	
KONSTANTIN THOEREN,	)	
et. al.,	)	
Defendants-	)	
counter-claimants/	)	
Appellees	)	
vs.	)	



No. 88-6107, 88-6424

HANS A. KUNZ, et. al., )  
                            )  
Third-party              )  
defendants/             )  
Appellants.             )  
\_\_\_\_\_  
                            )  
BURKE LEWIS, et. al., ) No. 88-6424  
                            )  
Appellants,             ) DC# CV-86-6775-MLR  
                            )  
and                        ) Central California  
                            )  
A. KUNZ, et. al.,        )  
                            )  
Plaintiffs-             )  
counter-defendants-    )  
cross-defendants/       )  
Appellants              )  
                            )  
vs.                       )  
                            )  
Defendants-             ) ORDER  
counter-claimant-      )  
cross-claimants/        )  
Appellees                )  
\_\_\_\_\_

Before: SNEED, Circuit Judge

The motion of Appellants Adriana  
International Corporation, Arian Films  
Productions, Ltd., Kemal Zeinal Zade, Hans-  
Albert Kunz and Anthony M. Midgen to  
substitute Bertram Fields, Michael K. Collins  
and the firm of Greenberg, Glusker, Fields,



No. 88-6107, 88-6424

Claman & Machtiner as attorneys of record in place of L. Burke Lewis, Amy J. Cassedy and the firm of Lewis & Company is granted.

Lewis & Company shall transfer the case file to new counsel within 7 days of entry of this order.

The optional reply brief of Appellants Adriana International Corporation, Arian Films Production, Ltd., Kemal Zeinal Zade, Hans-Albert Kunz and Anthony M. Midgen is due 28 days from entry of this order.

The optional reply brief of Intervenors/Appellants is due 14 days thereafter. Intervenors/Appellants shall brief those discrete issues involving Lewis & Company.



## APPENDIX XIII

Michael K. Zweig  
SACKS & ZWEIG  
9255 Sunset Boulevard, Suite 620  
Los Angeles, California 90069  
Telephone: (213) 550-6363

### UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ADRIANA INTERNATIONAL	)	Nos. 88-6107
CORPORATION, etc.	)	
	)	
Plaintiff-	)	
counter-defendant/	)	
Appellant	)	
	)	
vs.	)	DC# CV-86-6775-MLR
	)	Central California
	)	
LEWIS & COMPANY,	)	
et. al.,	)	
	)	
Intervenors/	)	
Appellants,	)	
	)	
KONSTANTIN THOEREN,	)	
et. al.,	)	
	)	
Defendants-	)	
counter-claimants/	)	
Appellees	)	
	)	
vs.	)	
	)	



No. 88-6107, 88-6424

HANS A. KUNZ, et. al., )  
                          )  
Third-party            )  
defendants/           )  
Appellants            )  
\_\_\_\_\_  
                          )  
BURKE LEWIS, et. al., ) No. 88-6424  
                          )  
Appellants,           ) DC# CV-86-6775-MLR  
                          )  
and                    ) Central California  
                          )  
                          )  
A. KUNZ, et. al.,     )  
                          )  
Plaintiffs-          )  
counter-defendants-  )  
cross-defendants/    )  
Appellants           )  
                          )  
vs.                   )  
                          )  
Defendants-          ) ORDER  
counter-claimant-   )  
cross-claimants/    )  
Appellees           )  
\_\_\_\_\_  
)

Before: SNEED, Circuit Judge

The motion of Lewis & Company for reconsideration of the order entered January 30, 1990, is referred to the next available motions panel for disposition.

The motion of Lewis & Company for a stay of the transfer of the case file to new



No. 88-6107, 88-6424

counsel pending disposition of the motion for reconsideration is granted.

The briefing schedule is vacated. A new schedule will be set upon disposition of the motion for reconsideration.

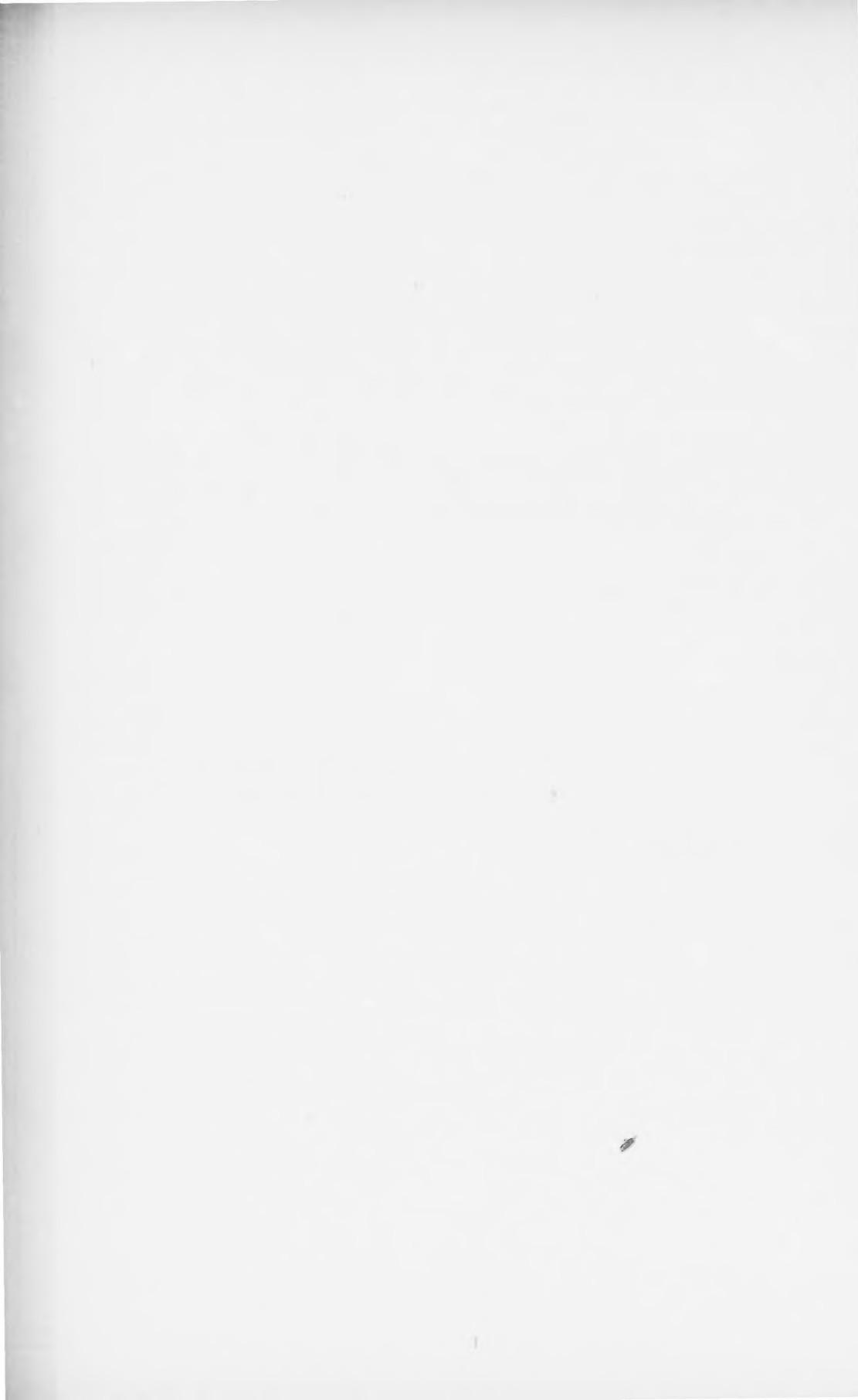


## APPENDIX XIV

Michael K. Zweig  
SACKS & ZWEIG  
9255 Sunset Boulevard, Suite 620  
Los Angeles, California 90069  
Telephone: (213) 550-6363

### UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ADRIANA INTERNATIONAL	)	Nos. 88-6107
CORPORATION, etc.	)	88-6424
Plaintiff-	)	
counter-defendant/	)	
Appellant	)	
vs.	)	DC# CV-86-6775-MLR
	)	Central California
LEWIS & COMPANY,	)	
et. al.,	)	
Intervenors/	)	
Appellants,	)	
KONSTANTIN THOEREN,	)	
et. al.,	)	
Defendants-	)	
counter-claimants/	)	
Appellees	)	
vs.	)	



HANS A. KUNZ, et. al., )  
Third-party )  
defendants/ )  
Appellants. )  
\_\_\_\_\_ )

Before: WALLACE and LEAVY, Circuit Judges

The motion of Lewis & Company for reconsideration of this court's January 30, 1990 order is denied. Lewis & Company shall comply with this court's January 30, 1990 order within 7 days of entry of this order. Failure to do so shall result in the imposition of sanctions.

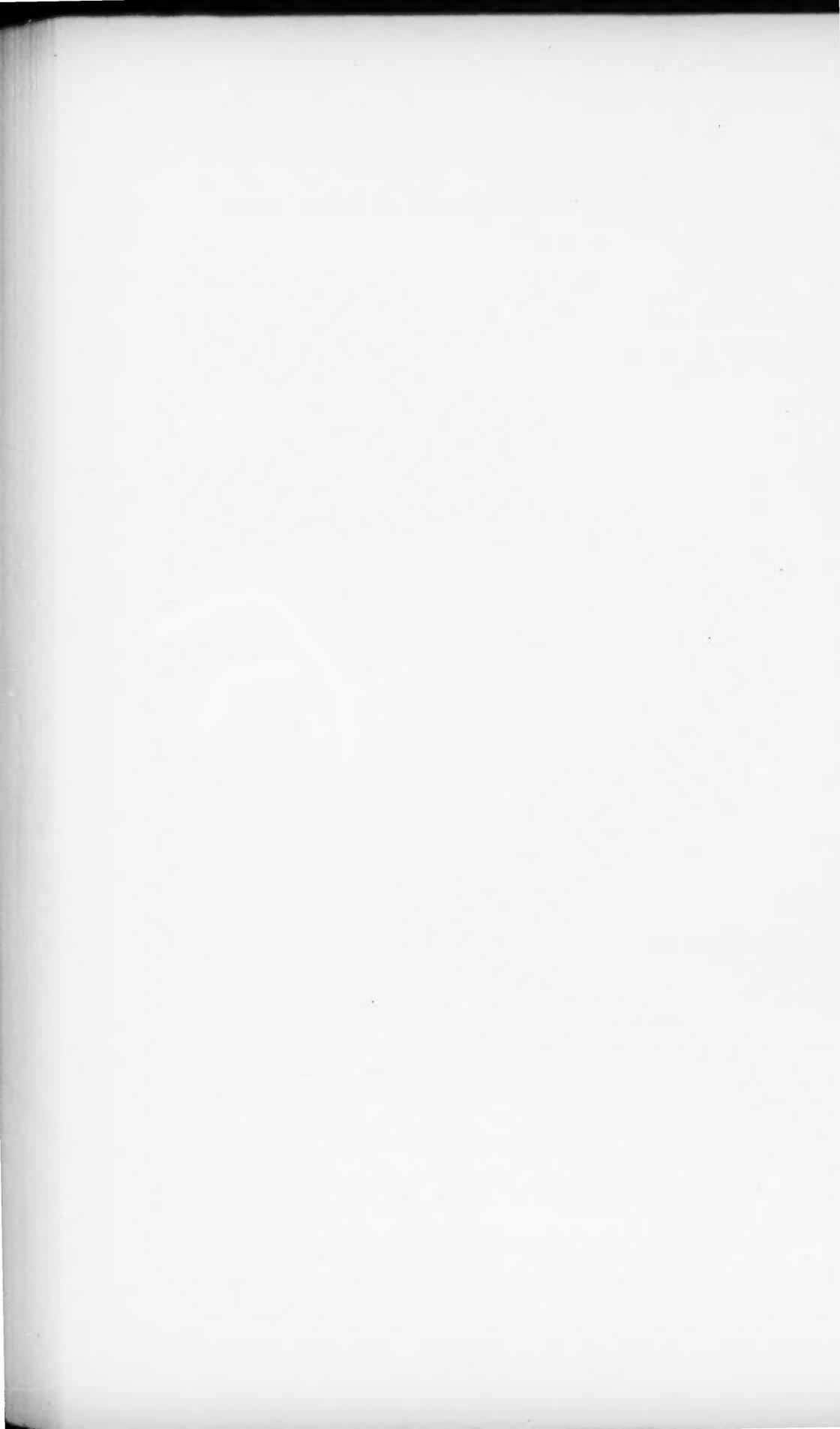
The optional consolidated reply brief of appellants Adriana International Corporation; Arian Films Production, Ltd.; Kemal Zeinal-Zade; Hans-Albert Kunz and Anthony M. Midgen is due 28 days from entry of this order.

The option reply brief of intervenors/appellants Lewis & Company is due within 14 days of service of appellants' reply brief. Intervenors/appellants shall brief those discrete issues involving Lewis &



No. 88-6107, 88-6424

Company. No further extensions of time shall  
be granted.



APPENDIX XV  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

ADRIANA INTERNATIONAL	)	Nos. 88-6107
CORPORATION, etc.	)	88-6424
Plaintiff-	)	
counter-defendant/	)	
Appellant	)	
vs.	)	DC# CV-86-6775-MLR
	)	Central California
LEWIS & COMPANY,	)	
et. al.,	)	
Intervenors/	)	
Appellants,	)	
KONSTANTIN THOEREN,	)	
et. al.,	)	
Defendants-	)	
counter-claimants/	)	
Appellees	)	
vs.	)	
HANS A. KUNZ, et. al.,	)	
Third-party	)	
defendants/	)	
Appellants.	)	

---

Before: WALLACE and LEAVY, Circuit Judges

The emergency motion received on April 6,  
1990 shall be deemed filed as of that date.



No. 88-6107, 88-6424

The motion for a stay of this court's April 2, 1990 order pending disposition of a petition for rehearing and suggestion for rehearing en banc is denied. Intervenor/appellant Lewis & Company shall comply with this court's April 2, 1990 order by April 13, 1990.

The optional consolidated reply brief of appellants Adriana International Corporation; Arian Films Productions, Ltd.; Kemal Zeinal-Zade; Hans-Albert Kunz and Anthony M. Midgen is due on or before May 7, 1990. The optional reply brief of intervenor/appellant Lewis & Company is due by May 21, 1990.

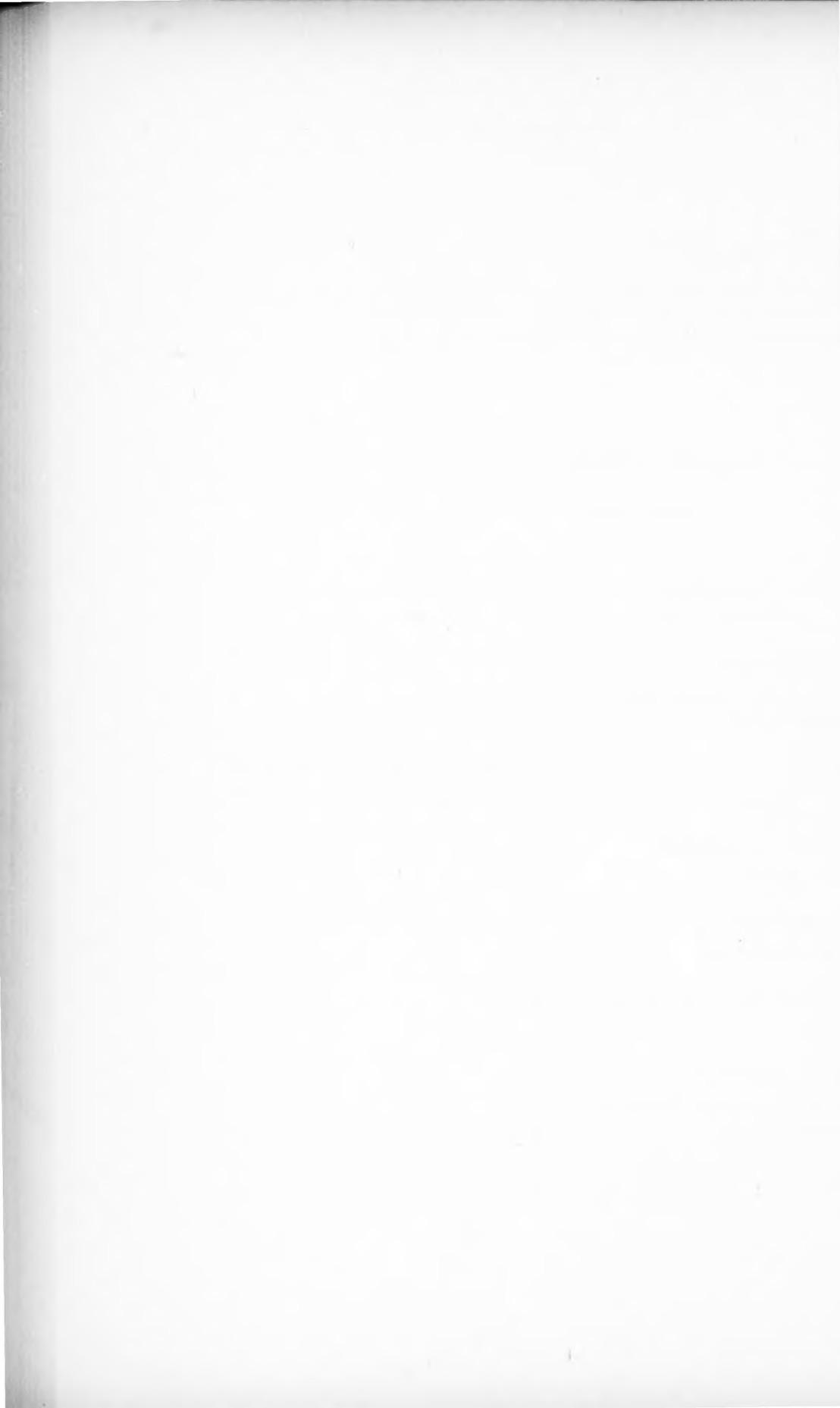


## APPENDIX XVI

Michael K. Zweig  
SACKS & ZWEIG  
9255 Sunset Boulevard, Suite 620  
Los Angeles, California 90069  
Telephone: (213) 550-6363

### UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ADRIANA INTERNATIONAL	)	Nos. 88-6107
CORPORATION, etc.	)	88-6424
	)	
Plaintiff-	)	
counter-defendant/	)	
Appellant	)	
	)	
vs.	)	DC# CV-86-6775-MLR
	)	Central California
	)	
LEWIS & COMPANY,	)	
et. al.,	)	
	)	
Intervenors/	)	
Appellants,	)	
	)	
KONSTANTIN THOEREN,	)	
et. al.,	)	
	)	
Defendants-	)	
counter-claimants/	)	
Appellees	)	
	)	
vs.	)	
	)	



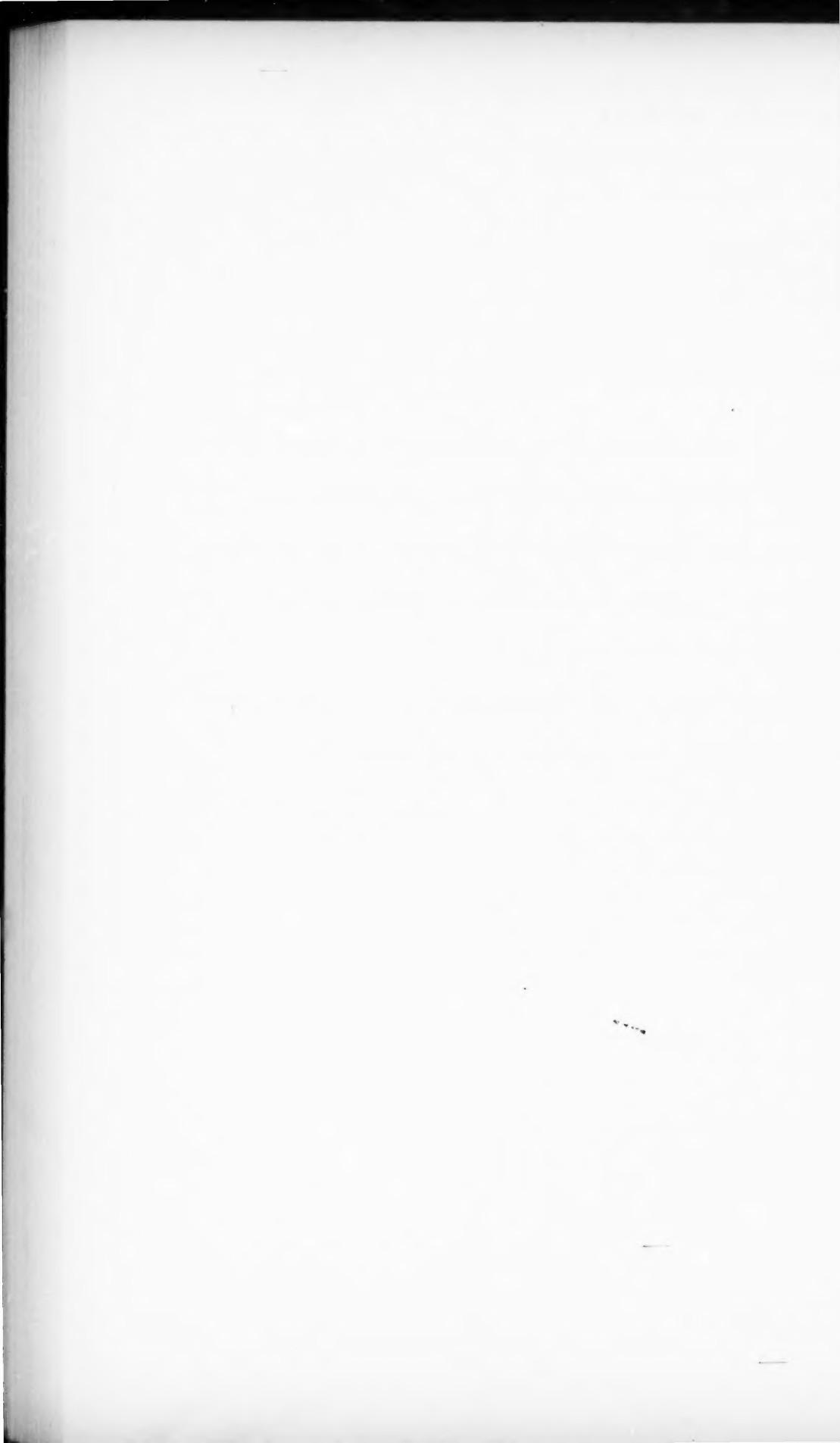
No. 88-6107, 88-6424

HANS A. KUNZ, et. al., )  
Third-party )  
defendants/ )  
Appellants. )  
\_\_\_\_\_ )

Before: WALLACE and LEAVY, Circuit Judges

Lewis and Company's emergency motion for expedited consideration of its petition for rehearing and suggestion for rehearing en banc is granted. Lewis & Company's reply brief remains due on May 21, 1990.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.



## APPENDIX XVII

Michael K. Zweig  
SACKS & ZWEIG  
9255 Sunset Boulevard, Suite 620  
Los Angeles, California 90069  
Telephone: (213) 550-6363

### UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ADRIANA INTERNATIONAL	)	No. 88-6107
CORPORATION	)	
Plaintiff-	)	D.C. No.
counter-defendant-	)	CV-86-6775-R
Appellant	)	
	)	ORDER
vs.	)	
	)	
LEWIS & COMPANY;	)	
L. BURKE LEWIS;	)	
AMY J. CASSEY;	)	
ARTHUR L. MARTIN	)	
	)	
Intervenors-	)	
Appellants	)	
	)	
vs.	)	
	)	
KONSTANTIN THOEREN;	)	
PATROLA FILMS, INC.	)	
PATROLA, G.M.B.H.	)	
	)	
Defendants-	)	
counter-claimants	)	
Appellees	)	
	)	
vs.	)	
	)	



HANS A. KUNZ; )  
ANTHONY M. MIDGEN; )  
KEMAL ZEINAL-ZADE; )  
ARIAN FILMS )  
PRODUCTIONS LTD. )  
 )  
Third-party- )  
defendants- )  
Appellants )  
\_\_\_\_\_  
 )  
BURKE LEWIS; ) No. 88-6424  
AMY J. CASSEY; )  
ARTHUR PRODUCTIONS, LTD. )  
LEWIS & COMPANY )  
 )  
Plaintiff- )  
counter-defendant- )  
cross-defendants- )  
Appellants )  
 )  
vs. )  
 )  
KONSTANTIN THOEREN, )  
et. al.; )  
PATROLA FILMS, INC.; )  
PATROLA, G.M.B.H. )  
 )  
Defendant- )  
counter-claimant- )  
cross-claimant- )  
Appellees )  
\_\_\_\_\_

BEFORE: ALARCON, BRUNETTI, and O'SCANNLAIN,  
Circuit Judges

Burke Lewis, Adriana International  
Corporation, A. Kunz, Anthony Midgen, and  
Kemal Zade ("Adriana") are sanctioned the  
reasonable amount of attorney's fees incurred



by Konstantin Thoeren as the result of Lewis filing frivolous opening briefs in this case plus double costs. Within seven days of this order THOEREN will file its declaration and brief, not to exceed 10 pages, setting forth the amount of attorney's fees it has incurred as a result of the filing of the frivolous opening briefs. Within seven days of the receipt of that brief, Lewis and Adriana will file briefs not to exceed 10 pages in response to Thoeren's declaration and brief. Upon consideration of all briefs, the court will enter an award of sanctions for the amount of reasonable attorney's fees incurred by Thoeren and double costs.



## APPENDIX XVIII

Constitution, Statutes, and Rules

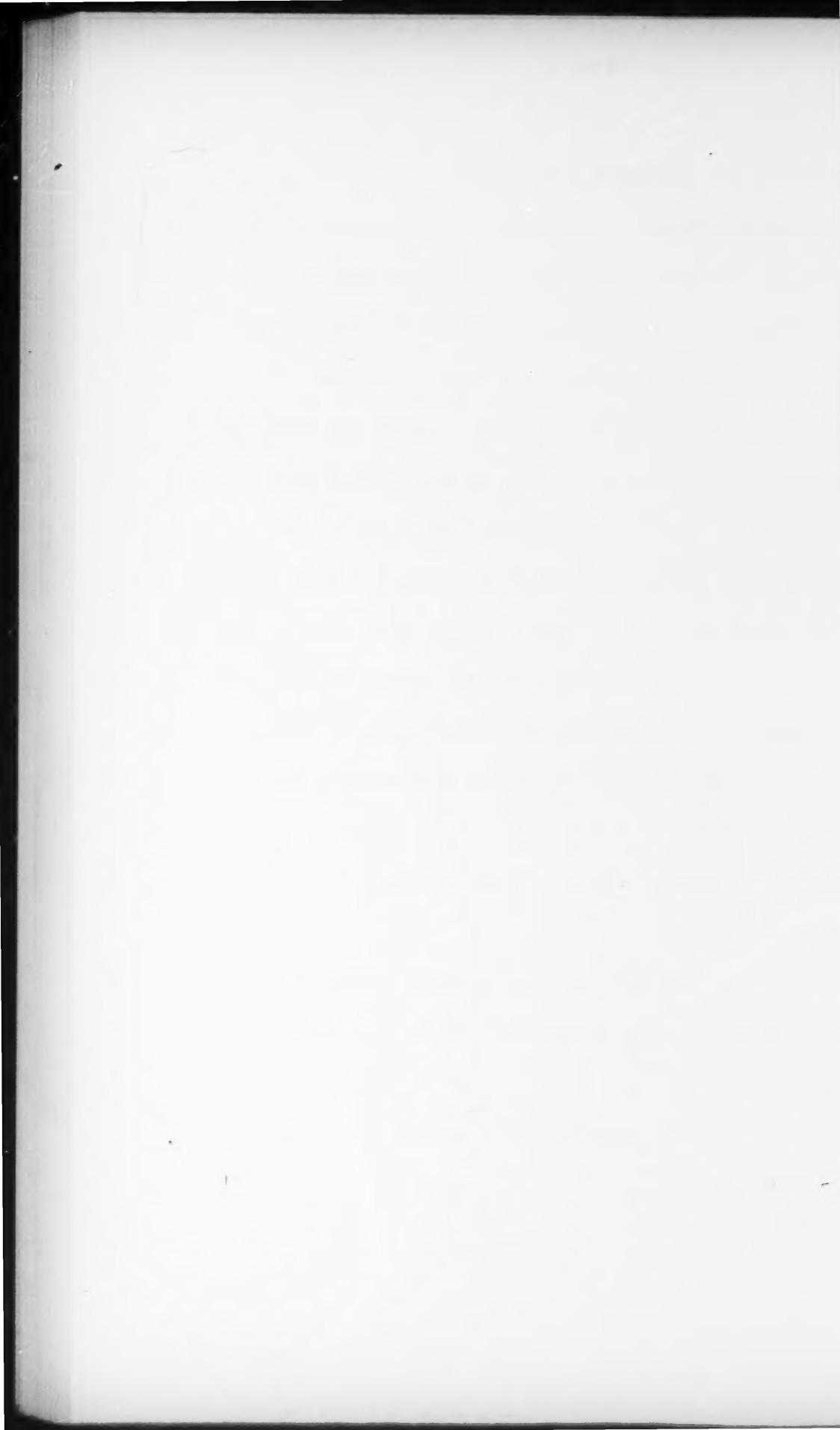
U.S. Const. Art. III §1 provides:

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

U.S. Const. amend. V provides, in pertinent part:

"No person shall ... be deprived of life, liberty, or property, without due process of law .... "

U.S. Const. amend. XIV provides, in pertinent part:



"No State shall ... deprive any person of life, liberty, or property, without due process of law .... "

28 U.S.C. §144 provides, in pertinent part:

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding."

28 U.S.C. §455 provides, in relevant part:

"(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.



"(b) He shall also disqualify himself in the following circumstances:

"(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

\* \* \*

"(4) He knows that he ... has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding."

28 U.S.C. §631 provides, in relevant part:

"(a) The judges of each United States district court ... shall appoint United States magistrates in such numbers and to serve at such locations within the judicial district as the conference may determine under this chapter ....



"(b) No individual may be appointed or reappointed to serve as a magistrate under this chapter unless:

"(1) He has been for at least five years a member in good standing of the bar of the highest court of a state ... and he is a member in good standing of the bar of the highest court of the State in which he is to serve ... except that an individual who does not meet the bar membership requirements of the first sentence of this paragraph may be appointed and serve as a part-time magistrate if the appointing court or courts and the conference find that no qualified individual who is a member of the bar is available to serve at a location;

"(2) He is determined by the appointing district court or courts to be competent to perform the duties of the office;

\* \* \*



"(4) He is not related by blood or marriage to a judge of the appointing court or courts at the time of his initial appointment; and

"(5) He is selected pursuant to standards and procedures promulgated by the Judicial Conference of the United States. Such standards and procedures shall contain provision for public notice of all vacancies in magistrate positions and for the establishment by the district courts of merit selection panels, composed of residents of the individual judicial districts, to assist the courts in identifying and recommending persons who are best qualified to fill such positions.

\* \* \*

"(e) The appointment of any individual as a full-time magistrate shall be for a term of eight years, and the appointment of any individuals as a part-time



magistrate shall be for a term of four years .... "

28 U.S.C. §634 provides, in pertinent part:

"(a) Officers appointed under this chapter shall receive, as full compensation for their services, salaries to be fixed by the conference pursuant to section 633, at rates for full-time United States magistrates up to an annual rate equal to 92 percent of the salary of a judge of the district court of the United States, as determined pursuant to section 135, and at rates for part-time magistrates of not less than an annual salary of \$100, nor more than one-half the maximum salary payable to a full-time magistrate .... "

28 U.S.C. §636 provides, in relevant part:

"(b)(1) Notwithstanding any provision of law to the contrary --



(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, [with exceptions not relevant here]. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

\* \* \*

"(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

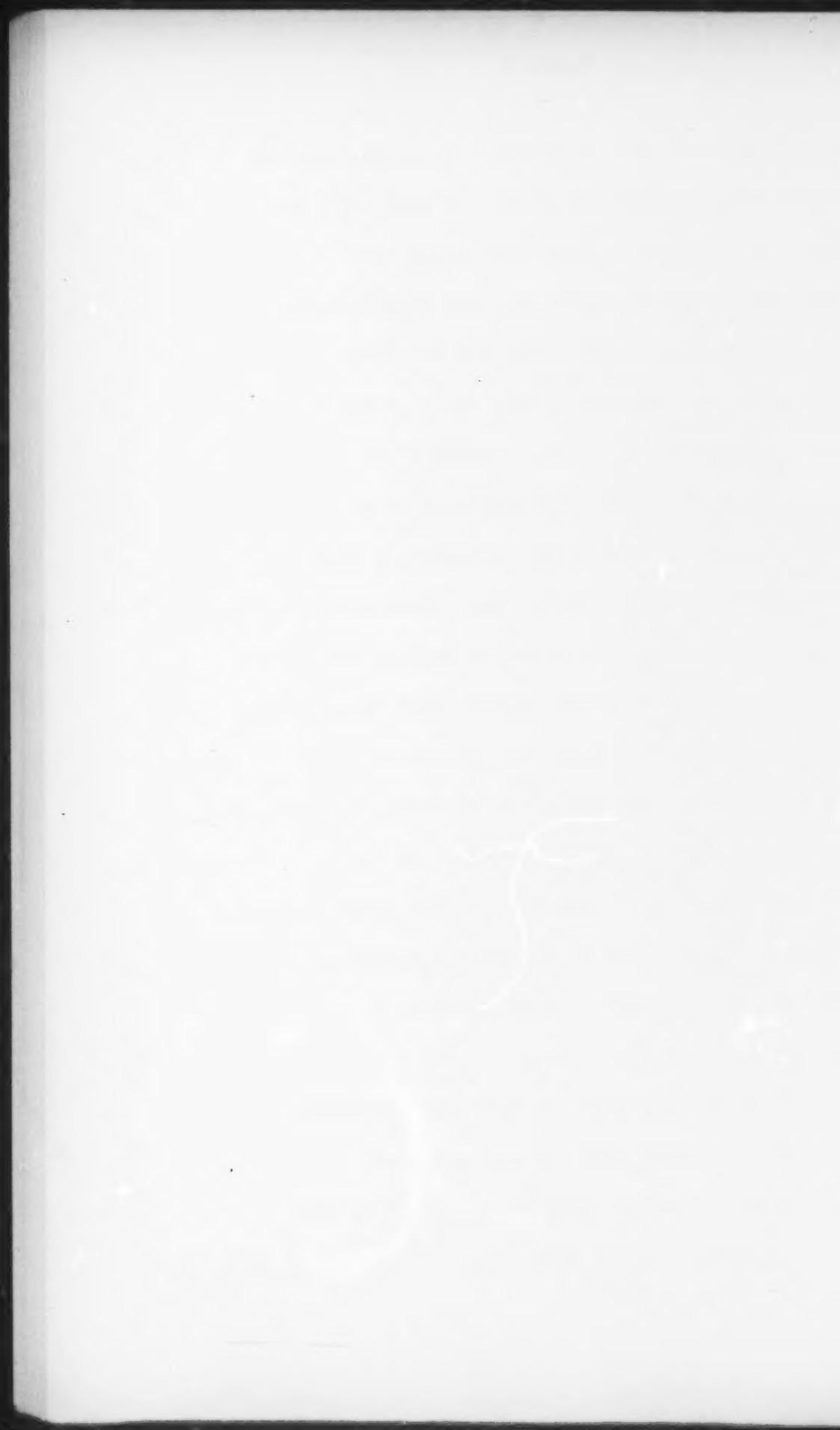
"Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to



which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

"(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

"(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.



"(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties."

28 U.S.C. §1927 provides, in pertinent part:

"Any attorney ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

Fed.R.App.P. 38 provides:

"If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

Fed. R.Civ. P. 11 provides, in relevant part:

"The signature of an attorney or party constitutes a certificate by the signed that the signer has read the



pleading, motion, or other paper; that to the best of the signer's knowledge, information,. and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of the litigation ... If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, whihc may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasoanble attorney's fee."

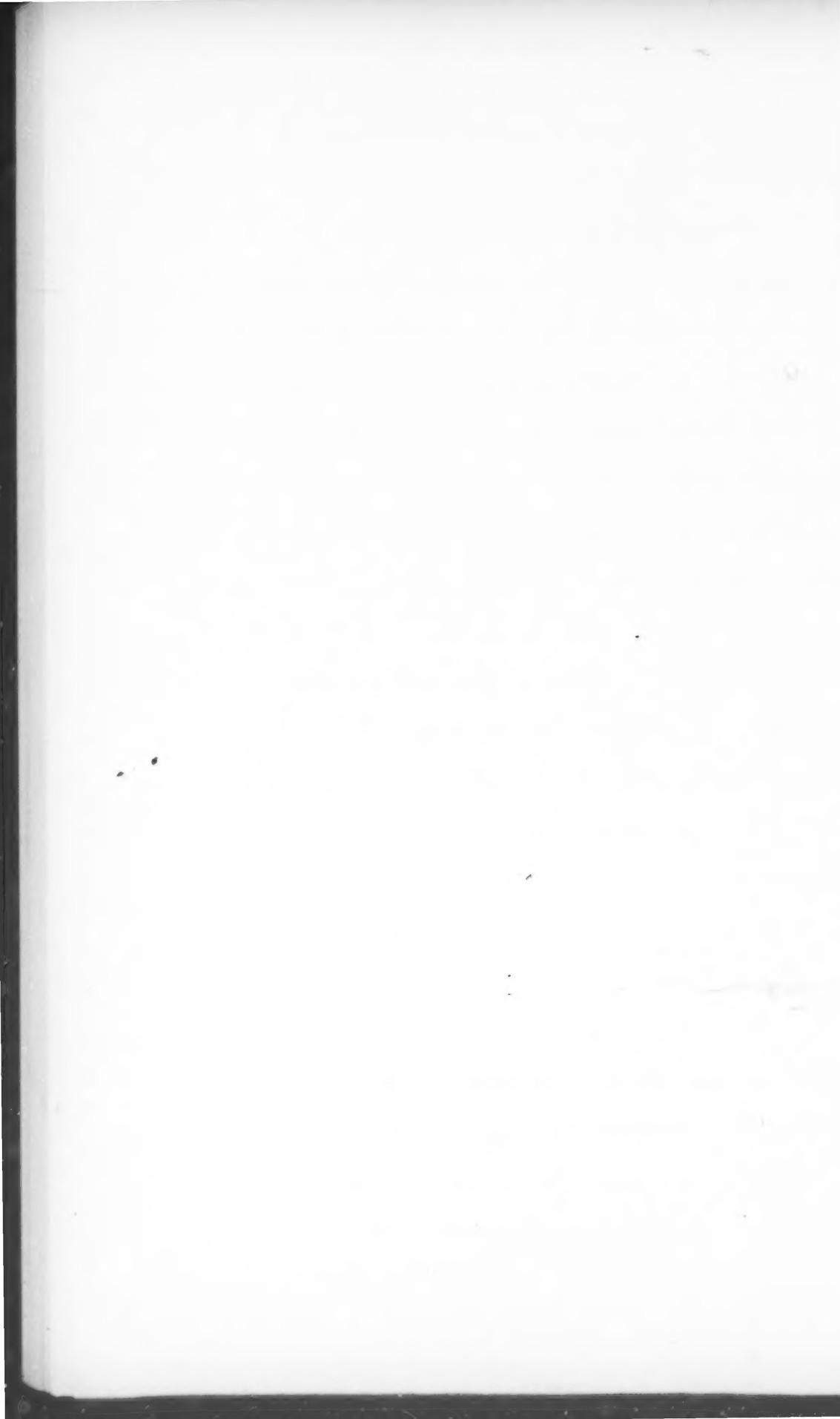


Fed. R.Civ. P. 26(g) provides, in pertinent part:

"Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated ... If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed."

Fed. R.Civ. P. 53 provides, in pertinent part:

"(a) The court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, an examiner, and an assessor. The



compesnation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action ... as the court may direct ... The master shall not retain the master's report as security for the master's compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

"(b) A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it."



Central District of California Local  
Rule 25.10 provides:

"The Court may appoint a master to supervise discovery and rule upon objections to discovery by an opposing party upon stipulation of the parties or when the Court determines that the efficient processing of the litigation and the interests of justice so require."

JAN 10 1991

JOSEPH F. SPANIOI, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1990

LEWIS & COMPANY, LAWYERS,  
L. BURKE LEWIS, AMY J. CASSEDY,  
*Petitioners,*

vs.

KONSTANTIN THOEREN, PATROLA FILMS, INC.,  
PATROLA, G.m.b.H., ADRIANA INTERNATIONAL  
CORPORATION, HANS ALBERT-KUNZ, KEMAL  
ZEINAL-ZADE, ANTHONY M. MIDGEN, ARIAN  
FILMS PRODUCTIONS, LTD., ARTHUR L. MARTIN,  
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI

MICHAEL K. ZWEIG

*Counsel of Record*

SACKS & ZWEIG

Suite 1300

100 Wilshire Boulevard

Santa Monica, California 90401

(213) 451-3113

*Of Counsel:*

BRUCE IAN FAVISH

528 Colorado Avenue

Santa Monica, California 90401

(213) 394-5995

*Attorneys for Respondents*

KONSTANTIN THOEREN, PATROLA FILMS, INC.,  
and PATROLA, G.m.b.H.

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1990

---

**LEWIS & COMPANY, LAWYERS,  
L. BURKE LEWIS, AMY J. CASSEY,**

*Petitioners,*

*vs.*

**KONSTANTIN THOEREN, PATROLA FILMS, INC.,  
PATROLA, G.m.b.H., ADRIANA INTERNATIONAL  
CORPORATION, HANS ALBERT-KUNZ, KEMAL  
ZEINAL-ZADE, ANTHONY M. MIDGEN, ARIAN  
FILMS PRODUCTIONS, LTD., ARTHUR L. MARTIN,**

*Respondents.*

---

ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

**BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

---

**MICHAEL K. ZWEIG**

*Counsel of Record*

**SACKS & ZWEIG**

Suite 1300

100 Wilshire Boulevard

Santa Monica, California 90401

(213) 451-3113

*Of Counsel:*

**BRUCE IAN FAVISH**

528 Colorado Avenue

Santa Monica, California 90401

(213) 394-5995

*Attorneys for Respondents*

**KONSTANTIN THOEREN, PATROLA FILMS, INC.,  
and PATROLA, G.m.b.H.**



## TABLE OF CONTENTS

I.	DEFECTS IN QUESTIONS PRESENTED BY LEWIS . . . . .	1
A.	<u>First Question</u> <u>Presented</u> . . . . .	3
B.	<u>Second Question</u> <u>Presented</u> . . . . .	7
C.	<u>Sixth Question</u> <u>Presented</u> . . . . .	8
II.	RESPONSE TO LEWIS' "LIST OF PARTIES" . . . . .	9
III.	RESPONSE TO LEWIS' "STATEMENT OF THE CASE" . . .	10
IV.	THOEREN'S STATEMENT OF THE CASE . . . . .	13
A.	<u>Lewis' Obstreperous</u> <u>Conduct and Sanctions</u> <u>in the District Court</u> . .	14
B.	<u>Failed Interlocutory</u> <u>Appeals</u> . . . . .	15
C.	<u>Lewis' Obstreperous Conduct</u> <u>and Sanctions on Appeal</u> .	16
V.	SUMMARY OF ARGUMENT . . . . .	29
VI.	ARGUMENT . . . . .	30
A.	<u>Limited Scope of Review</u> .	30
B.	<u>Purported Special</u> <u>Master Issues</u> . . . . .	36

1.	<u>Lewis Lacks Standing</u>	36
2.	<u>Waiver</u> . . . . .	42
3.	<u>Compensation of Special Master</u> . . .	46
4.	<u>Order Appointing Special Master Not Included in Appendix</u>	47
C.	<u>District Court Sanctions and Contempt</u> . . . . .	48
1.	<u>Certiorari Not Appropriate</u> . . . . .	48
2.	<u>Right to Immediate Review</u> . . . . .	49
D.	<u>Ninth Circuit Sanctions</u> .	52
1.	<u>No Grounds for Certiorari</u> . . . . .	53
2.	<u>No Abuse of Discretion</u> . . . . .	55
3.	<u>Sanctions Proper Under 28 U.S.C. § 1927</u> . . . . .	57
E.	<u>Petition for Rehearing and Rehearing En Banc</u> . .	59
F.	<u>"False testimony, sham issues and sham pleadings"</u> . . . . .	60
VII.	<u>CONCLUSION</u> . . . . . . .	64

APPENDIX: NINTH CIRCUIT OPENING BRIEF  
OF APPELLEES KONSTANTIN  
THOEREN, PATROLA FILMS,  
INC., AND PATROLA, G.m.b.H.

## TABLE OF AUTHORITIES

### Federal Cases

<u>Braley v. Campell</u> , 832 F.2d 1504 (10th Cir. 1987) . . . . .	56, 58
<u>Constant v. Advanced Micro-Devices, Inc.</u> , 848 F.2d 1560 (D.C. Cir.), <u>cert. denied</u> , ____ U.S. ___, 109 S.Ct. 228, 102 L.Ed.2d 218 (1988) . . .	43
<u>Cooter &amp; Gell v. Hartmarx Corp.</u> , 496 U.S. ___, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) . . .	48, 53, 54
<u>Cort v. Ash</u> , 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975)	. 35
<u>Duignan v. United States</u> , 274 U.S. 195, 47 S.Ct. 566, 71 L.Ed. 996 (1927) . . . . .	35
<u>Federal Sav. &amp; Loan Ins. v. Angell, Holmes &amp; Lea</u> , 838 F.2d 395 (9th Cir. 1988) . . . . .	62
<u>First Iowa Hydro Elec. Coop. v. Iowa-Illinois Gas and Elec. Co.</u> , 245 F.2d 613 (8th Cir.), <u>cert. denied</u> , 355 U.S. 871, 78 S.Ct. 122 (1957) . .	43
<u>Glanzman v. Uniroyal, Inc.</u> , 892 F.2d 58 (9th Cir. 1989) . . . . .	56
<u>Goldstein v. Andreson &amp; Co.</u> , 465 F.2d 972 (5th Cir. 1972) . . . . .	41

<u>Hamblen v. County of Los Angeles,</u> 803 F.2d 462 (9th Cir. 1986) . . . . .	53, 55, 56
<u>Hayes v. Foodmaker, Inc.,</u> 634 F.2d 802 (5th Cir. 1981) . . . . .	43
<u>Herzfeld &amp; Stern v. Blair,</u> 769 F.2d 645 (10th Cir. 1985) . . . . .	56
<u>Hill v. Durion Co.,</u> 656 F.2d 1208 (6th Cir. 1981) . . . . . . . . .	43
<u>Johnson Controls, Inc. v. Phoenix</u> <u>Control Systems, Inc.,</u> 886 F.2d 1173 (9th Cir. 1989) . . . . . . . . .	43
<u>Julien v. Zeringue,</u> 864 F.2d 1572 (D.C. Cir. 1989) . . . . . . . . .	56, 58
<u>Kapco Mfg. Co., Inc. v. C &amp; O</u> <u>Enterprises, Inc.,</u> 886 F.2d 1485 (7th Cir. 1989) . . . . . . . . .	34, 56
<u>Kashefi-Zihagh v. I.N.S.,</u> 791 F.2d 708 (9th Cir. 1986) . . . . .	62
<u>Kordich v. Marine Clerks Ass'n,</u> 715 F.2d 1392 (9th Cir. 1983) . . . . 33, 37-40, 50, 51	
<u>Libby, McNeill, and Libby v. City</u> <u>National Bank,</u> 592 F.2d 504 (9th Cir. 1978) . . . . . . . . .	41, 56
<u>Limerick v. Greenwald,</u> 749 F.2d 97 (1st Cir. 1984) . . . . 34, 56	
<u>Lipsiq v. Nat'l Student</u> <u>Marketing Corp.,</u> 663 F.2d 178 (D.C. Cir. 1980) . . . . . . . . .	56

<u>Lone Ranger Television, Inc. v.</u> <u>Program Radio Corp.</u> , 740 F.2d 718 (9th Cir. 1984) . . . . .	53, 56
<u>Malhiot v. Southern California</u> <u>Retail Clerks Union</u> , 735 F.2d 1133 (9th Cir. 1984) . .	55, 58
<u>McCoy v. Court of App. of Wisconsin</u> , 486 U.S. 429, 100 L.Ed.2d 440, 108 S.Ct. 1895 (1988) . . . . .	62, 63
<u>McDonnell v. Critchlow</u> , 661 F.2d 116 (9th Cir. 1981) . . . .	56
<u>Miller v. Fairchild Industries, Inc.</u> , 797 F.2d 727 (9th Cir. 1986) . . . .	33
<u>Mone v. Comm'r</u> , 774 F.2d 570 (2nd Cir. 1985) . . . . .	34, 56
<u>Morgan v. Kerrigan</u> , 530 F.2d 401 (1st Cir. 1976) . . . . .	47
<u>Morrissey v. Brewer</u> , 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) . . . . .	58
<u>Nix v. Emanuel Charles Whiteside</u> , 475 U.S. 157, 89 L.Ed.2d 123, 106 S.Ct. 988 (1986) . . . . .	63
<u>Pacemaker Diagnostic Clinic v.</u> <u>Instromedix, Inc.</u> , 725 F.2d 537 (9th Cir. 1984) . . . . .	44, 45
<u>Patrick v. Burget</u> , 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988) . . . . .	34, 35

<u>Roadway Express, Inc. v. Piper</u> , 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980) . . . . .	55, 57
<u>Seaboard Sur. Co. v. United States</u> , 306 F.2d 855 (9th Cir. 1962) . . . . .	41
<u>Shearson Loeb Rhoades, Inc.</u> , <u>v. Quinard</u> , 751 F.2d 1102 (9th Cir. 1985) . . . . .	56
<u>Spaulding v. University of Washington</u> , 740 F.2d 686 (9th Cir.), <u>cert. denied</u> , 469 U.S. 1036, 105 S.Ct. 511, 83 L.Ed.2d 401 (1984), <u>overruled on other grounds</u> , <u>Antonio v. Wards Cove Packing Co.</u> , 810 F.2d 1477 (9th Cir. 1987) . . . . .	43
<u>Trout v. Ball</u> , 705 F.Supp. 705 (D. D.C. 1989) . . . . .	47
<u>U.S. v. Associated Convalescent</u> <u>Enterprises, Inc.</u> , 766 F.2d 1342 (9th Cir. 1985) . . . . .	53
<u>United States v. Adamant Co.</u> , 197 F.2d 1 (9th Cir.), <u>cert. denied</u> , 344 U.S. 903, 73 S.Ct. 283, 97 L.Ed. 698 (1952) . . . . .	41
<u>Webb v. Beverly Hills Fed.</u> <u>Savings &amp; Loan Ass'n</u> , 364 F.2d 146 (9th Cir. 1966) . . . . .	41
<u>Westinghouse Electric Corp.</u> , <u>v. N.L.R.B.</u> , 809 F.2d 419 (7th Cir. 1987) . . . . .	53, 56
<u>Wood v. McEwen</u> , 644 F.2d 797 (9th Cir. 1981) . . . . .	56

Youakim v. Miller, 425 U.S. 231,  
96 S.Ct. 1399, 47 L.Ed.2d 701  
(1976) . . . . . 35, 44

Zaldivar v. Los Angeles,  
780 F.2d 823 (9th Cir. 1986) . . . . 53

California Cases

Fracasse v. Brent, 6 Cal.3d 784,  
100 Cal.Rptr. 385, 494 P.2d 9  
(1972) . . . . . 62

Statutes

28 U.S.C. § 631 et seq. . . . . . 45  
§ 1927 . . 28, 52, 55, 57, 58

Rules

Fed. R. App. P. 32(a) . . . . 19, 28, 52  
34 . . . . . . . . . 27  
38 . . . . . 19, 28, 52,  
54, 55, 57

Fed. R. Civ. P. 11 . . . . . 48  
53 . . . . . . . . . 45

Ninth Circuit Local Rule 34-4 . . . . 27

Ninth Circuit Internal  
Operating Procedures II.G. . . . . 27

Sup. Ct. R.	10	29, 36, 54
	10(a)	29
	10(c)	29
	14.1.(a)	2
	14.1(b)	9
	14.1(g)	10
	14.1(k)(ii)	6, 47
	14.5	3
	15	11
	15.1	2
	24	11
	24.2	2, 10

I. DEFECTS IN QUESTIONS  
PRESENTED BY LEWIS.<sup>1</sup>

---

<sup>1</sup>As used herein: "Lewis" or "Lewis parties" refers collectively to Lewis & Company, Lawyers, L. Burke Lewis and Amy J. Cassedy; "Adriana" refers collectively to Adriana International, Inc., Arian Films Productions, Ltd., Kemal-Zeinal Zade, Hans-Albert Kunz and Anthony M. Midgen; "Thoeren" refers collectively to Konstantin Thoeren, Patrola Films, Inc., and Patrola, G.m.b.H; "Greenberg Glusker" refers to Greenberg, Glusker, Fields, Claiman & Machtlinger, the law firm which replaced Lewis as counsel of record for Adriana; "Ninth Circuit" refers to the United States Court of Appeals for the Ninth Circuit; "District Court" refers to the United States District Court for the Central District of California; "Judge Real" refers to the Honorable Manuel L. Real, Chief Judge of the Central District; "Special Master", "Special Master Carroll", or "Mr. Carroll" refers to John Francis Carroll, special master appointed by Judge Real in the District Court action; "Petition" refers to Lewis' Petition for Writ of Certiorari; "Lewis App." refers to the Appendix submitted by Lewis in conjunction with the Petition; "Thoeren App." refers to the Appendix submitted herewith containing Thoeren's Ninth Circuit opening brief; and "Opinion" refers to the written opinion of the Ninth Circuit in this action, reprinted as Lewis App. I (Opinion references are to page numbers of Lewis App. I).

In view of Lewis' extraordinary "Questions Presented" (Petition, pp. i-ii), and in light of the directives of Sup. Ct. R. 15.1<sup>2</sup> and 24.2, Thoeren's counsel are compelled to comment on the propriety of Questions 1, 2 and 6 of Lewis' Questions Presented.

Sup. Ct. R. 14.1(a) provides that questions presented for review "should be short and concise and should not be argumentative or repetitious." Sup. Ct.

---

<sup>2</sup>Rule 15.1 provides in pertinent part (emphasis in original):

. . . the brief in opposition should address any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted.

. . . Counsel are admonished that they have an obligation to the Court to point out any perceived misstatements in the brief in opposition, and not later.

R. 14.5 adds: "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition."

Lewis' Questions Presented are neither short, nor concise, nor accurate, nor clear. Instead they are argumentative, repetitious, and replete with explicit and implicit misstatements.

A. First Question Presented.

Lewis' first Question addressing the appointment and conduct of Special Master Carroll is deficient in the following respects:

1. As discussed in sections which follow, the only issues Lewis has standing to raise in this proceeding

relate to the propriety of the sanctions and contempt orders imposed against Lewis by the District Court and the Ninth Circuit,<sup>3</sup> the propriety of the Ninth Circuit granting Adriana's motion to substitute in new counsel in place of Lewis, and the denial of Lewis' petition for rehearing and suggestion for rehearing en banc. None of these actions relates to the Special Master. Despite twice being ordered by the Ninth Circuit to limit any reply briefs to issues relevant to Lewis' appeal (Lewis

---

<sup>3</sup>In the course of the District Court proceedings, the Lewis parties were the objects of various sanctions and contempt orders. After final judgment, the Lewis parties appealed the sanctions and contempt on their own behalves, separate from the appeal filed on behalf of Adriana. The Adriana parties, the only parties arguably aggrieved by the Special Master's appointment, and therefore the only parties with standing to raise the issue on appeal, have not filed a petition for writ of certiorari.

App. XII and XIV), despite Greenberg Glusker's abandonment on appeal of Adriana's objection to the Special Master (Opinion, p. 2 n. 1), and despite a specific finding by the Ninth Circuit that as to Adriana objections to the Special Master were waived, and as to Lewis they were irrelevant (Opinion, p. 32 n. 11), Lewis persists in making relentless, far-fetched objections to Special Master Carroll. It is misleading and inaccurate of Lewis to suggest to this Court that he has standing to challenge the appointment of Special Master Carroll.

2. Lewis' statement that Judge Real "deputize[d]" Special Master Carroll is inaccurate.<sup>4</sup>

---

<sup>4</sup>Although Lewis seeks to have this Court review the District Court's reference to Special Master Carroll, the March 18, 1987 written order appointing

3. Lewis' statement that Mr. Carroll is Judge Real's "long-time friend" is a baseless and misleading attempt to insinuate collusion between Judge Real and Mr. Carroll. Despite myriad similar innuendos by Lewis throughout the proceedings below, and in the instant Petition, Lewis has never offered a shred of evidence to support his ad hominem accusations (Opinion, pp. 33-34).

4. Lewis' statement that Mr. Carroll was appointed to serve as "a surrogate judicial officer" is inaccurate, misleading and argumentative.

5. Lewis' contention that

---

Mr. Carroll as master is not included in Lewis' Appendix, as required by Sup. Ct. R. 14.1(k)(ii). Accordingly, Lewis' First Question is not properly presented.

litigants were ordered to pay Special Master fees on pain of contempt "at the annual rate of \$750,000",<sup>5</sup> is misleading, irrelevant, argumentative, and not substantiated by the record.

See section VI.B.3. infra.

B. Second Question Presented.

Lewis' Second Question regarding alleged "false testimony, sham issues, and sham pleadings" is simply unintelligible. It is also irrelevant, inaccurate and completely unsupported by the record. While Lewis' Second Question fails to articulate any justiciable issue, a careful reading of pp. 42-47 of the Petition suggests that he contends the Ninth Circuit erred in

---

<sup>5</sup>The Lewis parties did not raise Mr. Carroll's compensation as an issue in their Ninth Circuit opening briefs; consequently, it was not properly before that Court.

granting Adriana's motion to substitute new counsel in place of Lewis.<sup>6</sup>

The proposition apparently advanced by Lewis -- that the Ninth Circuit erred by granting Adriana's request to retain new counsel and refusing to mandate the continued employment of Lewis -- is unabashed lunacy. See section VI.F. infra.

C. Sixth Question Presented.

Lewis' Sixth Question presented attempts to ask whether attorneys should have a right of immediate interlocutory appeal of sanctions awards. This question is improper as (1) Lewis never sought direct interlocutory appeal of the sanctions awards and so lacks standing, and (2) Lewis did not raise

---

<sup>6</sup> Lewis' protracted opposition to this motion, detailed in the chronology in section IV.C., infra., is nothing short of unbelievable.

this issue in the Ninth Circuit opening  
briefs.

II.       **RESPONSE TO LEWIS'**  
**"LIST OF PARTIES".**

Sup. Ct. R. 14.1.(b) requires a  
petition for writ or certiorari to  
include "a list of all parties to the  
proceeding in the court whose judgment  
is sought to be reviewed."

In the caption and at p. iii of the  
Petition, Lewis includes "Arthur L.  
Martin" as a party. This inclusion is  
inexplicable as Arthur Martin -- an  
attorney who at one point worked for  
Lewis -- was not a party to the  
proceedings below and is not named in  
the judgment sought to be reviewed.

For clarification, Adriana  
International, Inc. was Plaintiff and  
Counter-Defendant in the District Court,  
Appellant in the Ninth Circuit, and is a

Respondent herein. Arian Films Productions, Ltd., Kemal-Zeinal Zade, Hans-Albert Kunz, and Anthony M. Midgen were Third-Party Defendants in the District Court, Appellants in the Ninth Circuit, and are Respondents herein. Konstantin Thoeren, Patrola Films, Inc., and Patrola, G.m.b.H. were Defendants and Counter- and Cross-Complainants in the District Court, Appellees in the Ninth Circuit, and are Respondents herein.

III.           RESPONSE TO LEWIS'  
"STATEMENT OF THE CASE".<sup>7</sup>

Language from Thoeren's Ninth

---

<sup>7</sup>Sup. Ct. R. 14.1(g) requires a petition to contain a "concise statement of the case containing the facts material to the consideration of the questions presented." Sup. Ct. R. 24.2 provides that in a respondent's brief "no statement of the case need be made beyond what may be deemed necessary to correct any inaccuracy or omission in the statement of the other side."

Circuit brief is fitting in response to Lewis' phantasmic Statement of the Case:

Reading Appellants' four briefs, spanning in excess of 130 pages, is akin to a walk with Alice through the Looking Glass. The reader, for proper perspective, must constantly recognize the absence of reality and the wholesale employment of distortion. Nothing is as Appellants would have this Court believe . . .

Thoeren App., p. 1.

It is impossible in view of space limitations, to address all of Lewis' inaccuracies and omissions. Counsel will endeavor, consistent with their obligations under Sup. Ct. R. 15 and 24, to correct the misconceptions perpetrated.<sup>8</sup>

---

<sup>8</sup>Following is a sampling of Lewis' claims which either find no support in the record, are inaccurate, and/or are matters Lewis has no standing to raise: (a) "[C]areers and lives are at stake." (p. 4); (b) There is systemic "corruption in the largest Federal judicial district in the United States

and its Chief Judge [sic]" (p. 4); (c) The Ninth Circuit is engaged in a "cover up" of the alleged corruption. (p. 4); (d) The Ninth Circuit's opinion contains "75 misrepresentations of facts, basic law, and the record." (p. 4); (d) "Nowhere . . . does the Ninth Circuit's opinion specify the purported misconduct by petitioners[.]" (p. 5) (Such misconduct is detailed at pp. 30-37 of the Opinion.); (e) "[N]owhere was there even a motion in the district court which specified purported misconduct." (p. 5) (There were several.); (f) "The purpose of such intellectual dishonesty is to undermine petitioners' credibility in bringing to public attention the uncontested facts evidencing the corrupt practice in the Central District of California." (p. 5); (g) Judge Real "has for the last 13 years appointed his long-time friend, John Francis Carroll, outside the confines of the U.S. Constitution, statute, or federal rules, to serve as a surrogate judicial officer, exercising Judge Real's federal judicial authority[.]" (pp. 5-6); (h) "[L]itigants are made to pay Mr. Carroll's salary, on pain of contempt, at the annual rate of approximately \$750,000, including compensation for Mr. Carroll's support staff and associate/daughter." (p. 6); (i) "Through this practice, approximately \$10 million has changed hands, although neither Judge Real nor Mr. Carroll will formally disclose the extent of the practice[.]" (p. 6) (see section VI.B.3. infra.); (j) "[T]he FBI

## IV.

THOEREN'S STATEMENT  
OF THE CASE.

Thoeren offers the following chronology to apprise this Court of facts relevant to the only issues Lewis arguably has standing to raise, viz.: the Ninth Circuit's affirmance of sanctions and contempt orders against Lewis by the District Court; the Ninth Circuit's imposition of additional sanctions against Lewis in connection with the appeal; the Ninth Circuit's

---

has commenced an investigation at the request of a federal appellate judge to the very highest levels of that agency." (p. 6); (k) "[T]here already appears to have been one homicide resulting from attempts by lawyers to expose corruption in federal courthouses in California." (p. 7); (l) Lewis' "own physical safety has been put in jeopardy[.]" (p. 7); Lewis has suffered adverse rulings in unrelated proceedings due to the Ninth Circuit decision (pp. 7-8 n. 4); (m) Judge Real has "sold or bartered" his office "for benefit of friends, and other judges, who . . . are protecting such judge and his corrupt practice." (p. 8).

granting of Adriana's motion to substitute new counsel; and the Ninth Circuit's denial of Lewis' petition for rehearing and suggestion for rehearing en banc. Regarding the underlying dispute and Lewis' outrageous conduct before the District Court, see the Opinion (pp. 4-9, 12-17 and 30-37), the District Court's February 8, 1988 order (Lewis App. V), and Thoeren's Ninth Circuit brief (Thoeren App., pp. 18-45).

A. Lewis' Obstreperous Conduct and Sanctions in the District Court.

March 16, 1987: Lewis sanctioned \$4,955.00 for frivolous motion to disqualify Thoeren's counsel, "payable forthwith" (Lewis App. II).

March 24, 1987: Lewis sanctioned \$990.00 for failure to comply with Local Rule 6, "payable forthwith" (Lewis App. III).

May 19, 1987: Lewis ordered in contempt for failure to pay sanctions ordered on March 16 and March 24, and sanctioned an additional \$2,520.00 (Lewis App. IV).

July 5, 1988: Lewis sanctioned \$2,292.50 for bad faith filing of motion for reconsideration of amended order (Lewis App. IX).

February 8, 1988: Lewis sanctioned \$6,440.00 for unnecessary court appearances and legal costs caused by frivolous and dilatory tactics (Lewis App. V).

District Court monetary sanctions against Lewis totaled \$17,197.50.

B. Failed Interlocutory Appeals.

April 9, 1987: The Adriana parties, not Lewis, appeal the March 16 and March 24, 1987 sanctions awards. (Ninth Circuit docket no. 87-5817).

June 12, 1987: The Adriana parties, not

Lewis, appeal the May 19, 1987 contempt and sanctions (Ninth Circuit docket no. 87-6060; consolidated with appeal no. 87-5817 by Ninth Circuit).

December 21, 1987: Ninth Circuit dismisses Adriana appeals for lack of jurisdiction as interlocutory in nature.

C. Lewis' Obstreperous Conduct and Sanctions on Appeal.

May 15, 1989: Lewis serves motion for leave to file opening brief in excess of 50 pages (100 pages sought) and for 30-day extension of time beyond original due date of May 23, 1989.

May 22, 1989: Ninth Circuit grants Lewis extension of time to June 22, 1989, but denies permission to file brief in excess of 50 pages. Order states: "Absent extraordinary circumstances, no further extension of time to file this brief will be

granted."

May 24, 1989: Lewis serves motion for reconsideration of May 22 order, requests permission to file a single consolidated brief of up to 125 pages (25 pages more than original request) and seeks an additional extension.

Lewis threatens: "In the event this court denies such relief, appellants will file a separate brief for each appellant, incorporating by reference arguments among such separate briefs."

June 7, 1989: Ninth Circuit grants Lewis permission to file an opening consolidated brief not to exceed 60 pages, but denies time extension.

June 15, 1989: Lewis serves motion for reconsideration of June 7 order, again requests permission to file a 125-page brief, and seeks yet another time extension. Lewis again threatens: "In

the event such relief is not granted, appellants will file separate briefs pursuant to Fed. R. App. P. 28(i)."

June 22, 1989: Due date for Lewis' opening brief comes and goes.

June 22, 1989: Lewis serves request for modification of June 7 order, seeking extension of time to file brief until 10 days after the Ninth Circuit rules on Lewis' June 15 motion for reconsideration.

July 7, 1989: Ninth Circuit denies Lewis' June 15 motion for reconsideration and states: "Appellants may elect to submit a single oversize brief of not more than 60 pages on behalf of all appellants." Ninth Circuit grants Lewis another extension to July 20, 1989 to file opening brief.

July 25, 1989: Thoeren's counsel receives four separate opening briefs

from Lewis' office, totaling 131 pages. Each brief incorporates and cross-references substantial portions of the others. The density of the briefs is compounded by 1-1/2 line spacing, rather than double-spacing as required by Fed. R. App. P. 32(a). The briefs are prolix, confusing, full of irrelevant and erroneous representations of law and fact, and lack intelligible, relevant legal analysis.

September 29, 1989: Thoeren files a single opening brief (Thoeren App.). The brief requests attorneys' fees and costs under Fed. R. App. P. 38.

October 3, 1989: Greenberg Glusker serves motion to substitute as new counsel of record for Adriana in place of Lewis. The motion recites that Lewis, in violation of California law and ethical canons, refused to effect

the substitution of new counsel or release client files.

October 10, 1989: Lewis serves 35-page response to Greenberg Glusker's motion, inter alia, challenging Adriana's right to change counsel, claiming that the substitution is for the improper purpose of having the Court rely on allegedly false testimony and documents proffered by Adriana, and requesting an order that Lewis be retained as Adriana's counsel.

October 11, 1989: Greenberg Glusker submits reply memorandum stating inter alia (at p. 1):

In opposition to the motion, Lewis has filed a brief that defies description. It is, quite literally, incredible.

Lewis' opposition is replete with unfounded, untrue and irrelevant assertions and scurrilous attacks on Lewis' former clients and their new attorneys.

Michael Collins, of Greenberg

Glusker, submits supporting declaration  
stating:

I have reviewed the opening  
briefs filed on behalf of  
appellants, and I have  
reviewed the appellees' brief  
that was recently filed.  
Based thereon, I have reached  
the tentative conclusion  
(subject to further research  
and review of the record) that  
certain arguments made on  
behalf of appellants in the  
opening briefs are without  
merit or so tangential as to  
be irrelevant. I expect that  
the reply briefs will abandon  
and withdraw certain of those  
arguments . . . .

October 17, 1990: Lewis serves 10-page  
supplemental opposition in response to  
Greenberg Glusker's reply memorandum.

November 9, 1989: Lewis serves a second  
supplemental opposition.

November 28, 1989: Greenberg Glusker  
serves a supplemental reply memorandum  
stating inter alia (at pp. 4, 5):

The matters referred to in  
Lewis' opposition to the  
substitution motion concerning

his view of the merits underlying the action are both untrue and completely irrelevant to a determination of this appeal.

. . .

The assertion (which was Lewis' creation) that Chief Judge Real was receiving some sort of monetary "kick-back" from the appointed special master is obnoxious and an affront to the Court, for which appellants humbly apologize.

December 6, 1989: Lewis serves 25-page response to Greenberg Glusker's supplemental reply memorandum. This is Lewis' fourth lengthy pleading in response to Greenberg Glusker's motion to substitute in as new counsel.

January 30, 1990: The Ninth Circuit grants Greenberg Glusker's motion to substitute as counsel for Adriana, and orders Lewis to transfer the case file within 7 days. The Court sets new dates for the reply briefs and orders that any reply brief from Lewis "shall brief those discrete issues involving Lewis &

Company" (Lewis App. XII; emphasis added).

February 6, 1990: Lewis serves motion for partial modification and/or stay of the Ninth Circuit's January 30 order pending reconsideration.

February 9, 1990: Lewis serves 30-page motion for reconsideration (with 40 pages of exhibits) of the January 30 order and requests a stay pending reconsideration.

February 13, 1990: Greenberg Glusker serves opposition to Lewis' motion for reconsideration stating inter alia (at p. 2):

Lewis sees constitutional issues in every question. He accuses the Chief Judge of the District Court, the Special Master, his former clients and their successor counsel of fraud, corruption and collusion, all without a shred of evidence.

February 19, 1990: Lewis serves reply.

March 2, 1990: Lewis' motion for stay of transfer of case file to new counsel pending disposition of the motion for reconsideration is granted; the briefing schedule is vacated.

April 2, 1990: Ninth Circuit denies Lewis' motion for reconsideration. Lewis is ordered to deliver case file to new counsel within 7 days; briefing schedule is again revised. Ninth Circuit again directs Lewis to brief only "those discrete issues involving Lewis & Company," and mandates no further extensions of time (Lewis App. XIV).

April 6, 1990: Lewis serves motion for emergency stay of Ninth Circuit's April 2 order pending petition for rehearing and suggestion for hearing en banc.

April 9, 1990: Court denies motion for

stay and orders Lewis to comply with April 2 order by April 13, 1990.

April 16, 1990: Lewis serves 15-page petition for rehearing and suggestion for rehearing en banc of January 30, April 2, and April 9 orders.

April 30, 1990: Lewis serves 17-page emergency motion for expedited consideration of petition for rehearing and suggestion for rehearing en banc, or in the alternative for extension of time to file reply briefs.

May 2, 1990: Greenberg Glusker serves opposition to Lewis' emergency motion stating inter alia (at pp. 1, 4):

Appellants file this opposition to dispel any inference that there is any truth whatsoever to the incredible accusations made in the emergency motion or the underlying papers and to suggest that this Court consider imposing appropriate sanctions upon Lewis for his conduct, including disbarment.

May 7, 1990: Greenberg Glusker serves

Adriana Reply Brief.

May 7, 1990: Lewis serves 15-page reply (not including copious declarations and exhibits) to Greenberg Glusker's opposition to Lewis' emergency motion.

May 8 or 9, 1990: Ninth Circuit denies Lewis' emergency motion for expedited consideration of the petition for rehearing, and affirms May 21, 1990 due date for Lewis' reply.

May 21, 1990: Nearly one year to the day after Lewis' original May 23, 1989 due date for opening briefs, Lewis serves two reply briefs, one of 20 pages (not including attachments) on behalf of Lewis & Company and Amy J. Cassedy, and one of 19 pages (not including extensive attachments) on behalf of L. Burke Lewis. By addressing the same irrelevant issues raised in the Petition herein, the briefs violate the Ninth

Circuit's January 30 and April 2, 1990 orders limiting Lewis' reply briefs to "discrete issues involving Lewis & Company."

June 7, 1990: The case is argued before the Ninth Circuit. The Panel allocates 30 minutes of argument to Thoeren, 30 minutes to Adriana and 5 minutes to Lewis. Lewis requests, and the Panel accedes to, 9 minutes of argument time.<sup>9</sup>

September 5, 1990: The Ninth Circuit orders sanctions against Lewis and Adriana for reasonable attorneys' fees and double costs, and sets briefing schedule on subject of fees and costs.

September 10, 1990: The Ninth Circuit

---

<sup>9</sup>Pursuant to Fed. R. App. P. 34, Ninth Circuit Local Rule 34-4, and Ninth Circuit Internal Operating Procedures II.G., the Panel has discretion to regulate oral argument time, and may deny argument altogether where an appeal is frivolous.

renders its decision (Lewis App. I), inter alia, affirming the sanctions and contempt orders against Lewis, and awarding additional attorneys' fees and double costs under Fed. R. App. P. 38 and 28 U.S.C. § 1927, on grounds that Lewis' opening briefs are frivolous and in violation of Fed. R. App. P. 32(a).

September 12, 1990: Thoeren submits brief requesting award of attorneys' fees and double costs.

September 20, 1990: Lewis serves motion for extension of time to respond to the Ninth Circuit's September 5, 1990 order.

September 24, 1990: Lewis serves a petition for rehearing and suggestion for rehearing en banc. Adriana serves a petition for rehearing.

October 5, 1990: Ninth Circuit denies Lewis' motion for extension of time to respond re fees and costs.

October 21, 1990: Lewis serves motion for clarification of the October 5, 1990 order.

November 16, 1990: Ninth Circuit denies Lewis' motion for clarification of October 5, 1990 order; denies Lewis' petition for rehearing on grounds of untimeliness; and assesses attorneys' fees and double costs against Adriana and Lewis.

V. SUMMARY OF ARGUMENT

Sup. Ct. R. 10 sets forth factors to be considered by this Court in deciding whether to grant certiorari. Only sections (a) and (c)<sup>10</sup> are even

---

<sup>10</sup> Sup. Ct. R. 10 states in part:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed

remotely applicable to Lewis' Petition. As detailed below, the arguments advanced by Lewis are irrelevant, unsubstantiated and offensive. Moreover, they fail to identify any legitimate constitutional issue, any conflict among Circuits, or any other important issue conceivably justifying certiorari.

## VI. ARGUMENT

### A. Limited Scope of Review.

Lewis improperly includes issues in

---

from the accepted and usual course of judicial proceedings, or sanctioned a departure by a lower court, as to call for an exercise of this Court's power of supervision.

- (b) [Not applicable.]
- (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

the Petition which the Ninth Circuit rejected as untimely raised and/or irrelevant to the sanctions and contempt orders appealed by Lewis. This Court should employ the same limited focus.

The Ninth Circuit limited Appellants' opening brief to 60 pages (see June 7, 1989 entry of chronology, p. 17 infra.)<sup>11</sup>. Lewis filed four separate opening briefs on behalf of different Appellants, totalling 131 pages. Each brief incorporated sections of the other briefs.

Lewis' opening Ninth Circuit brief, which was 43 pages long, "joined" in the Arguments of the opening briefs of Adriana (39 pp.); Zade, Kunz and Midgen (43 pp.); and Arian Films Productions

---

<sup>11</sup>The Ninth Circuit's Order is omitted from Lewis' Appendix.

(5 pp.).<sup>12</sup> By including the "joined" portions of other briefs, the Lewis brief exceeded the allotted 60-page limit by 70 pages.<sup>13</sup>

The Ninth Circuit's January 30 and April 2, 1990 orders (Lewis App. XII and XIV) directed Lewis to limit any reply briefs to discrete issues relating to Lewis & Company, i.e., the sanctions and contempt orders. Nonetheless, Lewis raised numerous issues in the reply briefs not raised in the opening briefs and outside the ambit of the sanctions and contempt orders. Appropriately, the

---

<sup>12</sup> See copies of briefs in Lewis' Supplemental Appendix to Petition (lodged).

<sup>13</sup> Lewis employed a similar tactic with the reply briefs, "joining" a 20-page brief on behalf of Amy J. Cassedy and Lewis & Company, with a 19-page brief on behalf of L. Burke Lewis, resulting in 39 aggregate pages (Lewis' page limit was 20; see Lewis App. XI).

Ninth Circuit refused to consider the following arguments not included in Lewis' opening briefs<sup>14</sup> or outside the scope of the sanctions and contempt orders (see Opinion, p. 32 n. 11):

- (a) Judge Real should have been disqualified because of alleged ex parte communications with the Special Master;
- (b) the reference to the Special Master was unconstitutional;
- (c) the default judgment was unwarranted;
- (d) Kordich v. Marine Clerks Ass'n, 715 F.2d 1392 (9th Cir. 1983) should be overturned;
- (e) new counsel's motion for substitution was improper;
- (f) new counsel performed

---

<sup>14</sup> Miller v. Fairchild Industries, Inc., 797 F.2d 727, 738 (9th Cir. 1986) (issues raised for first time in reply brief will not be addressed).

improperly; and

(g) there was no personal jurisdiction over AFP.

Most of these arguments resurface in this Petition.<sup>15</sup>

This Court should not entertain on certiorari issues which the Ninth Circuit correctly declined.

In Patrick v. Burget, 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988), this Court declined to address an issue raised in a petition for certiorari which the Court of Appeals did not address:

A close reading of the opinion below, however, reveals that

---

<sup>15</sup> Advancing irrelevant arguments, where standing is lacking, justifies sanctions on appeal. See, e.g., Kapco Mfg. Co., Inc. v. C & O Enterprises, Inc., 886 F.2d 1485, 1494 (7th Cir. 1989); Mone v. Comm'r, 774 F.2d 570, 574-575 (2nd Cir. 1985); Limerick v. Greenwald, 749 F.2d 97, 101-102 (1st Cir. 1984).

the Court of Appeals did not address the question. This Court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court. [Cites.] We see no reason to depart from this practice in the case at bar.

486 U.S. at 99 n. 5. Accord, Youakim v. Miller, 425 U.S. 231, 234, 96 S.Ct. 1399, 47 L.Ed.2d 701 (1976); Cort v. Ash, 422 U.S. 66, 72 n. 6, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). The Court should deviate from this general policy only in exceptional circumstances (Duignan v. United States, 274 U.S. 195, 200, 47 S.Ct. 566, 71 L.Ed. 996 (1927)), which certainly are not present in this case.

Based on the foregoing, this Court should refuse to consider Questions 1, 2, and 6 of Lewis' Questions Presented.

B. Purported Special Master Issues.

Lewis maintains that issues involving reference to, and conduct of, Special Master Carroll are "the crux of this case" (Petition, p. 4). In reality, there are no grounds under Sup. Ct. R. 10 to grant certiorari as to issues relating to the Special Master because: (a) Lewis lacks standing to raise such issues; (b) objections to the Special Master were waived; (c) certain issues were not raised by the Lewis parties in their Ninth Circuit briefs; (d) Lewis' contentions are unsupported by any evidence; and (e) the Lewis parties have not included a copy of the order of reference in their Appendix.

1. Lewis Lacks Standing.

Due to Lewis' obstreperous conduct as counsel for Adriana, numerous

sanctions and a contempt order were imposed on Lewis and Adriana jointly and severally. All of the sanctions were ordered by the District Court. None of the orders was made by the Special Master. Lewis appealed the sanctions and contempt orders to the Ninth Circuit, which affirmed and assessed additional attorneys' fees and double costs for the appeal against Lewis and Adriana.

At page 22 (note 13) of the Petition, Lewis claims, based on a distorted reading of Kordich v. Marine Clerks Ass'n, supra., 715 F.2d 1392, that he has standing to challenge the appointment of Special Master Carroll, apparently because Lewis' clients had such standing. Kordich addressed the question whether attorneys, who were sanctioned jointly and severally with

their clients, had a right of immediate interlocutory appeal of the sanctions because they were "non-parties", or were bound by the rule applicable to their clients, that the sanctions were not appealable prior to entry of a final judgment. The Court held that because of the congruence of interests between attorney and client in that case, there was "no reason to permit indirectly through the attorney's appeal what the client could not achieve directly on its own: immediate review of interlocutory orders imposing liability for fees and costs." 715 F.2d at 1393. The Court dismissed the interlocutory appeal and noted that the attorneys would be free to challenge the sanctions on appeal

after final judgment.<sup>16</sup>

The Lewis parties claim that Kordich gives them standing to challenge the reference to the Special Master, presumably based on a theory that their congruence with Adriana was so great as to transmit or create standing for Lewis as if Lewis were Adriana.<sup>17</sup>

---

<sup>16</sup>Presumably, if in Kordich the award of attorneys' fees and costs was made by a special master, the attorneys, on their own behalf, could challenge the master's authority on appeal after final judgment. But where, as here, since all the sanctions orders against Lewis were issued by the Court, the Lewis parties have no standing to complain of the Special Master's actions.

<sup>17</sup>Indicative of Lewis' chronic distortion of law and fact, at p. 17 of the Ninth Circuit Reply Brief of Amy J. Cassedy and Lewis & Company, the Lewis parties condemn that part of Kordich which they now invoke for standing:

That the interests of lawyer and client are not synonymous, as required under Kordich [cite], is demonstrated every day in litigation, but never more clearly than here. . . . To assume concurrence of interest between

This is preposterous. Kordich does not hold or even suggest that upon final judgment, the attorneys alone could maintain an appeal of a judgment entered against their clients. This would be an absurd result and would fly in the face of basic principles of standing.

Only the parties aggrieved by the Special Master's orders, viz., Adriana et al., have standing to object to the master, and they have chosen not to seek

---

client and counsel and to give it the force of law is not only unfair but inherently and invidiously discriminatory and violative of fundamental notions of due process under the Fifth and Fourteenth Amendments of the U.S. Constitution.

Similarly, at pp. 61-63 of the Petition, Lewis urges this Court to overrule Kordich. Apparently, Lewis wants the interests of lawyer and client to be synonymous for purposes of standing to object to sanctions, but not synonymous regarding the right to an immediate interlocutory appeal.

review. It is well-established that only a party aggrieved by a final judgment may appeal from it, and that a party may only appeal to protect its own interests, not those of a coparty.

Libby, McNeill, and Libby v. City National Bank, 592 F.2d 504, 515 (9th Cir. 1978); Goldstein v. Andreson & Co., 465 F.2d 972, 973 n. 1 (5th Cir. 1972); Webb v. Beverly Hills Fed. Savings & Loan Ass'n, 364 F.2d 146, 149 (9th Cir. 1966); Seaboard Sur. Co. v. United States, 306 F.2d 855, 859 (9th Cir. 1962); United States v. Adamant Co., 197 F.2d 1, 5 (9th Cir.), cert. denied, 344 U.S. 903, 73 S.Ct. 283, 97 L.Ed. 698 (1952).

Lewis' attempt to manufacture standing for the Special Master issues renders Lewis' Petition frivolous.

## 2. Waiver.

As stated, the Lewis parties have no standing to object to the appointment of Special Master Carroll since Mr. Carroll did not issue the orders from which Lewis appeals. Even if standing is presumed, there is no reason to disturb the Ninth Circuit's correct determination that any objections to the Special Master were waived:

[A]n objection to the appointment of a special master must be made at the time of the appointment or within a reasonable time thereafter or the party's objection is waived. [Cite.]

Adriana did not object to the appointment of the special master at the time of the appointment. Adriana attended numerous meetings, depositions and hearings with the special master regarding discovery throughout March, April, May and June of 1987. Adriana finally objected to the appointment of a special master on July 6, 1987. Because the objection was not

filed within a "reasonable time" of the appointment, Adriana waived its objection to the special master's appointment.

Opinion, p. 10.

The record amply supports a finding of waiver under pertinent case law.<sup>18</sup>

---

<sup>18</sup> Objection to appointment of a special master is waived if not made at the time of, or within a reasonable time after, the appointment. Johnson Controls, Inc. v. Phoenix Control Systems, Inc., 886 F.2d 1173, 1176 (9th Cir. 1989); Spaulding v. University of Washington, 740 F.2d 686, 695 (9th Cir.), cert. denied, 469 U.S. 1036, 105 S.Ct. 511, 83 L.Ed.2d 401 (1984) overruled on other grounds, Antonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987).

Other circuits are in accord: Constant v. Advanced Micro-Devices, Inc., 848 F.2d 1560, 1566-67 (D.C. Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 109 S.Ct. 228, 102 L.Ed.2d 218 (1988) ("A party cannot wait to see whether he likes a master's findings before challenging the use of a master."); Hayes v. Foodmaker, Inc., 634 F.2d 802 (5th Cir. 1981); Hill v. Durion Co., 656 F.2d 1208, 1213 (6th Cir. 1981); First Iowa Hydro Elec. Coop. v. Iowa-Illinois Gas and Elec. Co., 245 F.2d 613 (8th Cir.), cert. denied, 355 U.S. 871, 78 S.Ct. 122 (1957).

Parties cannot wait to see how a master will rule, then, if displeased, have the master removed at any point. This would promote unchecked forum-shopping for masters and would undermine the special master's role.

There is no conflict among circuits or constitutional issue regarding appointment of, or waiver of objection to, special masters which would justify certiorari. In any case, the Court should not decide constitutional questions (e.g., constitutionality of a special master reference) where the issues can be resolved on other grounds, such as waiver. Youakim v. Miller, supra., 425 U.S. at 236.

Lewis argues at p. 34 of the Petition, that objection to the Special Master could not be waived under Pacemaker Diagnostic Clinic v.

Instromedix, Inc., 725 F.2d 537

(9th Cir. 1984). This is an inexcusable misstatement of law.

Pacemaker dealt with consent by the parties under 28 U.S.C. § 631 et seq. and local Oregon rules to have a federal magistrate try a patent infringement case. The case did not deal with a District Court reference to a special master under Fed. R. Civ. P. 53 and Central District of California local rules. Moreover, Pacemaker stands for the proposition that parties may waive the right to an Article III judge, even for trial:

A mandatory provision for trial of an unrestricted class of civil cases by a magistrate and not by Article III judges would violate the constitutional rights of the litigants. Nevertheless, as this aspect of the separation of powers doctrine embodied in Article III is personal to the parties, it may be waived.

725 F.2d at 542 (emphasis added).

3. Compensation of  
Special Master.

Lewis' accusations regarding compensation to Master Carroll are particularly offensive. The record in this case establishes that Mr. Carroll, billed the parties, at a rate of \$235 an hour, a total of \$23,667.50 (each party to pay one-half). Lewis, based only on ridiculous conjecture, claims that Mr. Carroll has received approximately \$750,000 annually<sup>19</sup> (Petition, p. 27), and \$10 million over a 13-year period as

---

<sup>19</sup> Interestingly, in Adriana's opening Ninth Circuit brief (see Lewis' Supplemental Appendix, p. 28).., Mr. Carroll's annual compensation was estimated at a mere \$420,000. Mr. Carroll's "raise", like the rest of the story, is fantasy.

a Special Master (Petition, p. 32).<sup>20</sup>

Putting aside Lewis' ludicrous imaginings, even if the issue of Special Master compensation was relevant to Lewis, if he had standing to raise it, and if it merited review by this Court, District Courts have broad discretion to set special master fees. Morgan v. Kerrigan, 530 F.2d 401, 427 (1st Cir. 1976). Mr. Carroll's \$235 per hour rate was reasonable in view of market rates charged by masters. See Trout v. Ball, 705 F.Supp. 705, 708-709 (D. D.C. 1989).

4. Order Appointing  
Special Master Not  
Included in Appendix.

Sup. Ct. R. 14.1.k.(ii) requires

---

<sup>20</sup> Lewis' extraordinary calculations assume Mr. Carroll billing over 3,200 hours per year for about 13 straight years (8.8 hours a day, 365 days a year) at a rate of \$235 per hour, working exclusively as a special master for Judge Real.

filings along with a petition for certiorari, an appendix containing any orders rendered in the case by lower courts. Although the District Court entered a written order on March 18, 1987 appointing Special Master Carroll, and Lewis seeks to challenge such appointment, the order is not included in Lewis' Appendix. This is yet another reason to reject Lewis' Special Master arguments.

C. District Court Sanctions and Contempt.

1. Certiorari Not Appropriate.

The Ninth Circuit properly reviewed the District Court's imposition of sanctions under Fed. R. Civ. P. 11 for abuse of discretion. (Opinion, pp. 4-5, citing Cooter & Gell v. Hartmarx Corp., 496 U.S. \_\_\_, 110 S.Ct. 2447, 2461, 110 L.Ed.2d 359 (1990).) The

Ninth Circuit found no abuse of discretion in the District Court's issuance of monetary sanctions in the aggregate amount of \$17,197.50 and contempt (Opinion, pp. 34-37).<sup>21</sup> No constitutional issue or conflict among circuits is raised by the Ninth Circuit affirmance; thus, there is no compelling basis, and in fact, no reason at all for this Court to grant certiorari to review the sanctions and contempt orders issued by the District Court.

2. Right to Immediate Review.

At pages 61-63 of the Petition, Lewis argues that he should have had an immediate right to appeal the District Court's sanctions orders, and, to the

---

<sup>21</sup>For review of facts supporting imposition of sanctions by District Court, see Thoeren App., pp. 18-45, 115-124; and Opinion, pp. 30-37.

extent Kordich, supra, precludes such immediate review, it should be overruled.

Shamefully, Lewis neglects to disclose to this Court that, unlike the Appellants in Kordich, the Lewis parties never sought interlocutory appeal of the sanctions. The two interlocutory appeals of sanctions in this case were filed on behalf of Adriana only (see pp. 15-16 infra.).<sup>22</sup> As there is no order denying Lewis the right to an interlocutory appeal, Lewis has no standing to raise the issue and it is not ripe. Lewis' reassertion of this

---

<sup>22</sup>A motion to dismiss Adriana's appeals based on lack of jurisdiction, filed by Thoeren on September 21, 1987, stated (at p. 6): "This Court does not need to determine whether any such congruence of interest exists in this case, because the only notices of appeal filed were by Adriana, not its attorneys." The Ninth Circuit granted the motion on December 21, 1987.

issue defies the most basic rules of standing and merits sanctions.

Additionally, the Lewis parties did not raise the interlocutory appeal issue in their opening Ninth Circuit briefs. The Kordich case is first argued in the reply brief of Amy J. Cassedy and Lewis & Company. The Ninth Circuit was justified in disregarding issues raised for the first time in Lewis' reply brief. This Court should disregard issues not presented or decided in the appellate court. See pp. 34-35 infra.

Finally, there is no legitimate reason for this Court to grant certiorari to consider whether attorneys sanctioned jointly and severally with their clients should have a right of immediate interlocutory appeal. Resolution of this issue is not required to decide this case, and is not

compelled by any pressing constitutional concern or conflict among circuits.

D. Ninth Circuit Sanctions.

The Ninth Circuit sanctioned Lewis under Fed. R. App. P. 38 for filing frivolous briefs (Opinion, p. 37), and under 28 U.S.C. § 1927<sup>23</sup> for violating Fed. R. App. P. 32(a) (briefs filed with 1-1/2 rather than double spacing)<sup>24</sup>.

---

<sup>23</sup>28 U.S.C. § 1927 provides:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

<sup>24</sup>Lewis misrepresents that the Ninth Circuit's August 29, 1989 Order (App. XI) "expressly approv[ed] the form and spacing of the opening briefs" (Petition, p. 52). The Court's order said nothing about form and spacing of Lewis' briefs.

1. No Grounds  
for Certiorari.

Sanctions awards are reviewable  
under an abuse of discretion standard.<sup>25</sup>

---

Courts of Appeal have discretion to award sanctions for violations of formatting rules. Hamblen v. County of Los Angeles, 803 F.2d 462, 465 (9th Cir. 1986). Of particular note is Westinghouse Electric Corp. v. N.L.R.B., 809 F.2d 419 (7th Cir. 1987) wherein appellants, whose motion for permission to file a longer brief was denied, circumvented the Court's order by using 1-1/2 rather than double spacing, the effect of which "was to stuff a 70-page brief into 50 pages," were rebuked: "Lawyers must comply with the rules and our orders rather than hope to put one over on the court and to apologize when caught. The penalty for a violation should smart." Id. at 425 fn.

<sup>25</sup> Lewis' Petition does not state a standard of review for sanctions imposed by the Ninth Circuit. In Cooter & Gell v. Hartmarx Corp., supra., 110 L.Ed.2d at 378, 381-382, this Court adopted an across-the-board abuse of discretion standard for sanctions, implicitly overruling the Ninth Circuit's two-tiered standard of review. See, e.g., Zaldivar v. Los Angeles, 780 F.2d 823, 828 (9th Cir. 1986); U.S. v. Associated Convalescent Enterprises, Inc., 766 F.2d 1342, 1345 (9th Cir. 1985); Lone Ranger Television, Inc. v. Program Radio Corp.,

As this Court recently noted in Cooter & Gell v. Hartmarx, supra., 110 L.Ed.2d at 383-384, appellants who challenge sanctions when they have "no reasonable prospect of meeting the difficult standard of abuse of discretion" may justifiably be sanctioned under Fed. R. App. P. 38.

If appeals of sanctions from a District Court to a Court of Appeals are frivolous where no reasonable prospect exists for meeting the abuse of discretion standard, a priori, attempted challenge of a Court of Appeals' exercise of discretion by means of certiorari, especially where no colorable issues meriting review under Sup. Ct. R. 10 are presented, is utterly

---

740 F.2d 718, 727 (9th Cir. 1984). The Ninth Circuit acknowledged the controlling authority of Cooter & Gell at pp. 4-5 of the Opinion.

frivolous.

2. No Abuse of Discretion.

Assuming arquendo a basis for certiorari, a Court of Appeals may sanction parties and attorneys under: (1) its inherent authority; (2) Fed. R. App. P. 38; and/or (3) 28 U.S.C. § 1927.<sup>26</sup> Roadway Express, Inc. v. Piper, 447 U.S. 752, 766, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980); Hamblen v. County of Los Angeles, supra., 803 F.2d at 465; Malhiot v. Southern California Retail Clerks Union, 735 F.2d 1133, 1137-1138 (9th Cir. 1984).

The Ninth Circuit acted well within its discretion in awarding attorneys'

---

<sup>26</sup> Immediately following and in response to Roadway Express, supra., 28 U.S.C. § 1927 was amended to include attorneys' fees.

fees and costs.<sup>27</sup> Even Adriana's

<sup>27</sup> Case law is in accord: Kapco Mfg. Co. v. C & O Enterprises, Inc., supra., 886 F.2d at 1491-1497; Glanzman v. Uniroyal, Inc., 892 F.2d 58, 61 (9th Cir. 1989) (claims not founded on fact or law); Julien v. Zeringue, 864 F.2d 1572, 1575-76 (D.C. Cir. 1989); Westinghouse Electric Corp. v. N.L.R.B., supra., 809 F.2d at 424-425; Braley v. Campell, 832 F.2d 1504, 1508-1516 (10th Cir. 1987); Hamblen v. County of Los Angeles, supra., 803 F.2d at 464-465 (violation of format requirements; "irresponsibly frivolous" brief); Shearson Loeb Rhoades, Inc. v. Quinard, 751 F.2d 1102, 1103 (9th Cir. 1985) (appeal of default judgment "wholly without merit"); Mone v. Comm'r, supra., 774 F.2d at 574-575; Malhiot v. Southern California Retail Clerks Union, supra., 735 F.2d at 1137-1138 (appeal wholly without merit; briefs misrepresent record and California law); Herzfeld & Stern v. Blair, 769 F.2d 645, 647 (10th Cir. 1985); Limerick v. Greenwald, supra., 749 F.2d at 101-102; Lone Ranger Television, Inc. v. Program Radio Corp., supra., 740 F.2d at 726-727; McDonnell v. Critchlow, 661 F.2d 116, 118-119 (9th Cir. 1981) (appeal meritless as to certain appellees); Wood v. McEwen, 644 F.2d 797, 802 (9th Cir. 1981) (spurious, unsubstantiated allegations of misconduct against various individuals and organizations); Lipsig v. Nat'l Student Marketing Corp., 663 F.2d 178, 180-182 (D.C. Cir. 1980); Libby, McNeill and Libby v. City National Bank, supra.

replacement counsel, Greenberg Glusker, acknowledged that its clients' opening briefs, prepared by Lewis, were replete with frivolous, irrelevant arguments (see October 11, 1989 entry in chronology, p. 20 infra.).

3. Sanctions Proper Under 28 U.S.C. § 1927.

Lewis argues that sanctions were not proper under 28 U.S.C. § 1927 because the Ninth Circuit did not make findings of "intent, recklessness or bad faith" (Petition, pp. 52-53). This argument does not speak to the sanctions awarded pursuant to Fed. R. App. P. 38. In Roadway Express, Inc. v. Piper, supra, 447 U.S. at 767, this Court wrote that, when imposing attorneys' fees and costs under their inherent

---

592 F.2d at 511 (no standing to appeal issues relating only to coparties).

powers, courts should provide fair notice, an opportunity for a hearing, and a finding of attorney conduct constituting or tantamount to bad faith. While the Court did not specify these procedures to be applicable to imposition of sanctions under 28 U.S.C. § 1927, such procedures were in any event satisfied in this case.<sup>28</sup>

Lewis was put on notice of possible sanctions by the request for attorneys'

---

<sup>28</sup> See Julien v. Zeringue, supra., 864 F.2d 1575-1576, citing Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972) (due process satisfied where counsel had notice and opportunity to respond to request for sanctions); Braley v. Campbell, supra., 832 F.2d at 1514-1515 ("[T]he panel's extensive discussion of the appeal's lack of merit and of the defects in Alexander's briefing of the appeal constituted sufficient findings and conclusions. . . . At the appellate level, the right to respond does not require an adversarial, evidentiary hearing."); Malhiot v. Southern California Retail Clerks Union, supra., 735 F.2d at 1138.

fees and costs in Thoeren's Ninth Circuit opening brief (Thoeren App., p. 2). The Lewis parties had an opportunity to respond in their reply briefs, again at oral argument, and finally by filing a response to the award of fees and costs, which Lewis did not file. The Opinion contains sufficient findings to support the sanctions awarded. See Opinion, pp. 37-38. In sum, no issue justifying certiorari is presented.

E. Petition for Rehearing and Rehearing En Banc.

The Lewis parties argue, without presenting any supporting authority, that the Ninth Circuit improperly denied their petition for rehearing and suggestion for rehearing en banc as untimely (Petition, pp. 20-21). The findings stated in the Ninth Circuit's

order denying the petition for rehearing (Lewis App. X) are proper and not clearly erroneous. No issue is presented which justifies a grant of certiorari.

F. "False testimony, sham issues and sham pleadings."<sup>29</sup>

Lewis' argument that the Ninth Circuit erred by granting Adriana's motion to replace Lewis as its counsel in view of Lewis' purported attempt to disclose "sham testimony, sham issues and sham pleadings" is the greatest sham, and shame, of all. Lewis advanced the argument relentlessly and futilely in the Ninth Circuit in opposing Greenberg Clusker's motion to substitute as counsel of record for Adriana, and on

---

<sup>29</sup>Petition, pp. 42-47.

appeal.<sup>30</sup> Reassertion of this argument before this Court is beyond frivolous.<sup>31</sup>

In addition to Lewis' argument being based on factual fabrication, it lacks any legal merit. As Greenberg Glusker pointed out in their Ninth Circuit pleadings submitted in support of their motion to substitute in as Adriana's counsel, applicable law unequivocally grants a client the absolute right to discharge an attorney

---

<sup>30</sup>The Ninth Circuit considered and rejected Lewis' arguments, as presented in Lewis' many Briefs on the subject. See Opinion, p. 32 n. 11.

<sup>31</sup>As Adriana's replacement counsel, Greenberg Glusker presumably was in a position to evaluate the validity of Adriana's testimony, issues, and pleadings, as well as Lewis' accusations. Greenberg Glusker categorically condemned Lewis' contentions. See chronology entries for October 11, 1989, November 28, 1989, February 13, 1990, and May 2, 1990 (pp. 20, 21-22, 23, and 25, respectively).

at any time for any reason.<sup>32</sup>

Though the matter is irrelevant to Lewis' Petition, and not necessary for its disposition, Lewis seeks to have this Court hold that the Sixth Amendment of the United States Constitution precludes dismissal of counsel in private civil actions where counsel has threatened disclosure of alleged client falsehoods. As in the proceedings below, Lewis presents no persuasive authority for this obnoxious proposition. The two cases cited at p. 43 of the Petition, McCoy v. Court of

---

<sup>32</sup> Federal Sav. & Loan Ins. v. Angell, Holmes & Lea, 838 F.2d 395, 395-396 (9th Cir. 1988) (the law of California "holds that a client's power to discharge an attorney, with or without cause, 'is absolute.'"); Kashefi-Zihagh v. I.N.S., 791 F.2d 708, 711 (9th Cir. 1986) ("A party may terminate his counsel's representation at any time."); Fracasse v. Brent, 6 Cal.3d 784, 790, 100 Cal.Rptr. 385, 494 P.2d 9 (1972).

App. of Wisconsin, 486 U.S. 429, 100 L.Ed.2d 440, 108 S.Ct. 1895 (1988) and Nix v. Emanuel Charles Whiteside, 475 U.S. 157, 89 L.Ed.2d 123, 106 S.Ct. 988 (1986), are patently inapposite. First, the cases address criminal defendants' Sixth Amendment rights to counsel, not at issue in this civil case; and second, they do not support the proposition that a client who intends to perjure himself somehow forfeits the right to change counsel.

Even if there was any validity to Lewis' claims, Lewis' remedy was to make a motion to withdraw as counsel.<sup>33</sup> Instead Lewis violated his ethical

---

<sup>33</sup> McCoy v. Court of App. of Wisconsin, supra., 486 U.S. at 436 ("An attorney, whether appointed or paid, is therefore under an ethical obligation to refuse to prosecute a frivolous appeal."); Nix v. Whiteside, supra., 475 U.S. at 174.

obligations and sought to injure his clients by refusing to withdraw.

As with the rest of Lewis' petition, no remotely colorable issue meriting certiorari is presented.

#### VII. CONCLUSION

Mercifully, this is Lewis' Court of last resort.

Thoeren respectfully requests that the Petition be denied, and the Motion for Attorneys' Fees and Double Costs, brought concurrently by Thoeren, be granted.<sup>34</sup>

---

<sup>34</sup>In the event of such an award, at the Court's invitation, Thoeren will submit a pleading itemizing attorneys' fees and costs.

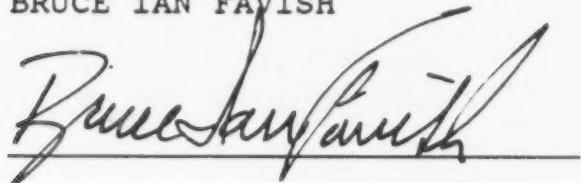
Dated: January 10, 1991.

Respectfully submitted,

MICHAEL K. ZWEIG  
SACKS & ZWEIG

  
Counsel of Record  
for Respondents  
Konstantin Thoeren,  
Patrola Films, Inc.,  
and Patrola, G.m.b.H.

Of Counsel:  
BRUCE IAN FAVISH

  
Bruce Ian Favish

(4)

CASE NO. 90-994

Supreme Court, U.S.

FILED

FEB 1 1991

JOSEPH F. SPANIOLO, JR.  
CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1990

\*\*\*\*\*

LEWIS & COMPANY, LAWYERS,  
L. BURKE LEWIS, AMY J. CASSEDY,

Petitioners,

vs.

KONSTANTIN THOEREN, PATROLA FILMS, INC.,  
PATROLA, G.m.b.H., ADRIANA INTERNATIONAL  
CORPORATION, HANS A.-KUNZ, KEMAL ZEINAL-  
ZADE, ANTHONY M. MIDGEN, ARIAN FILMS  
PRODUCTIONS, LTD., ARTHUR L. MARTIN,

Respondents

\*\*\*\*\*

ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
NINTH CIRCUIT

\*\*\*\*\*

REPLY TO OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI

\*\*\*\*\*

*L. Burke Lewis  
22203 Pacific Coast Highway  
Malibu, California 90265  
(213) 317-1285  
Counsel for Petitioners*

*Of Counsel:*

*Amy J. Cassedy  
Malibu, California*



## TABLE OF CONTENTS

TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii
I. INTRODUCTION; THOEREN FAILS TO REFUTE CRITICAL FACTS.....	1
II. APPOINTMENT OF DENOMINATED "MASTER".....	8
A. Petitioners Have Standing...	8
B. "Waiver" Arguments are Inapposite.....	11
III. SUBSTITUTION OF COUNSEL.....	16
IV. SANCTIONS IMPOSED BY DISTRICT COURT.....	17
V. NINTH CIRCUIT SANCTIONS.....	18
VI. CONCLUSION.....	19
APPENDIX	



## TABLE OF AUTHORITIES

### CASES

<u>Alaniz v. Cal. Processors, Inc.</u> , 690 F.2d 717 (9th Cir. 1982) ...	12,
	13
<u>Cal. Archit. Bldg. Prod. v. Franciscan Ceramics, Inc.</u> , 818 F.2d 1466 (9th Cir. 1987) ..	18
<u>Cher v. Forum International, Ltd.</u> , 692 F.2d 634 (9th Cir. 1982) ...	4
<u>Emle Ind., inc. v. Patentex, Inc.</u> , 478 F.2d 562, (2d Cir. 1973) ...	18
<u>Evans v. Artek Systems Corp.</u> , 715 F.2d 788 (2d Cir. 1983) ....	18
<u>F.D.I.C. v. Tefken Const. and Inst. Co.</u> , 847 F.2d 440 (7th Cir. 1987) ...	10
<u>Fjelstad v. American Honda Motor Co., Inc.</u> , 762 F.2d 1134 (9th Cir. 1985) ..	7
<u>Global Van Lines v. Superior Court</u> , 144 Cal.App.3d 490, 192 Cal.Rptr. 609 (1983) .....	18
<u>International Union (UAW) v. N.L.R.B.</u> , 459 F.2d 1329 (D.C. Cir. 1972) .	3
<u>Kordich v. Marine Clerks Ass'n</u> , 715 F.2d 1392 (9th Cir. 1982) ..	10
<u>LaBuy v. Howes Leather Co.</u> , 352 U.S. 249, 77 S.Ct. 309, L.Ed.2d 290 (1957) .....	12



<u>Liljeberg v. Health Services Acquisition Corp.,</u>	
486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d (1988) .....	4
<u>McCoy v. Court of Appeals of Wisconsin,</u>	
486 U.S. 429, 108 S.Ct. 1895, 100 L.Ed.2d 440 (1988) .....	16, 17
<u>Nix v. Whiteside,</u>	
475 U.S. 157, 106 S.Ct. 988, 89 L. Ed. 2d 123 (1986) .....	16, 17
<u>Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.,</u>	
458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) .....	15
<u>Pacemaker Diagnostic Clinic v. Instromedix, Inc.,</u>	
725 F.2d 537 (9th Cir. 1984) ...	14
<u>Rex Oil, Ltd. v. M/V Jacinth,</u>	
873 F.2d 82 (5th Cir. 1989) ....	11
<u>U.S. ex rel. Celanese Coatings Co. v. Gullard,</u>	
504 F.2d 466 (9th Cir. 1974) ..	11
<u>United States v. Raddatz,</u>	
447 U.S. 667, 100 S. Ct. 2406, 65 L.Ed.2d 424 (1980) .....	15
<u>Westinghouse Elec. Corp. N.L.R.B.,</u>	
809 F.2d 419 (7th Cir. 1987) ...	19



<u>Youakiam v. Miller,</u>	
425 U.S. 231, 96 S.Ct. 1399,	
74 L.Ed.2d 701 (1976) .....	8

#### STATUTES

28 U.S.C. §144 .....	4
28 U.S.C. §455 .....	4
28 U.S.C. §636 .....	14, 15
Fed. R.App. P. 28(i) .....	13, 19
Fed. R.Civ. P. 6(a) .....	7
Fed. R.Civ. P. 26(g) .....	5, 18, 19
Fed. R. Civ. P. 53 .....	11, 12, 13, 14, 15
S.Ct. R. 10.1(a) .....	18

#### TREATISES

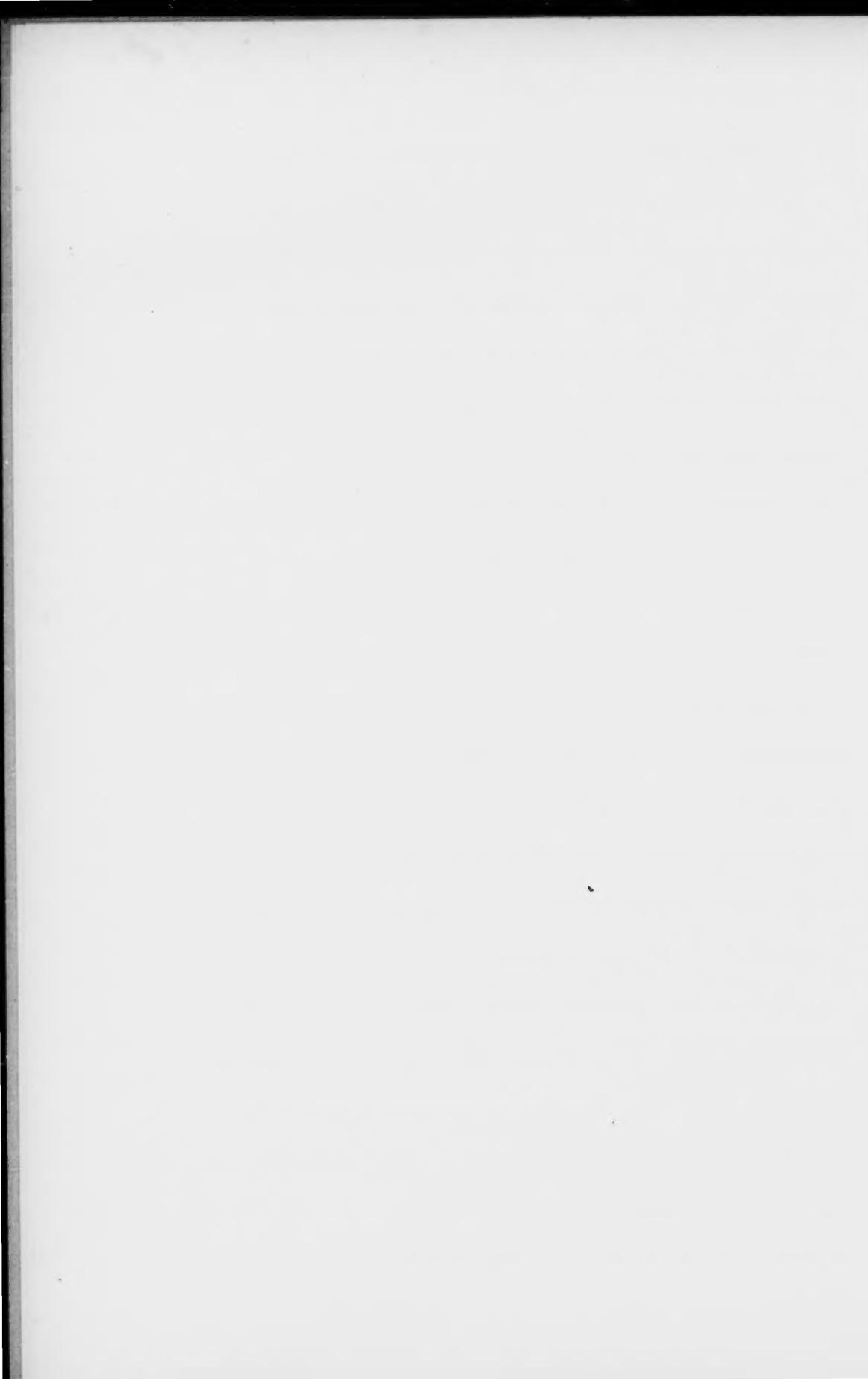
15 Wright, Miller & Cooper, Federal Practice & Procedure, Jurisdiction, §3902 (1976 & (1990 Supp.) .....	11
---	----



COME NOW PETITIONERS LEWIS & COMPANY,  
LAWYERS, L. BURKE LEWIS, and AMY J.  
CASSEDY ("L&C" or "petitioners"), and  
reply to the opposition of respondents  
Konstantin Thoeren, Patrola Films, Inc.,  
Patrola, G.m.b.H., ("Thoeren") to the  
petition for writ of certiorari.

**I. INTRODUCTION; THOEREN FAILS TO REFUTE  
CRITICAL FACTS**

The petition presents a frightening scenario: a federal judge unconstitutionally delegating judicial authority to a personal friend concurrent with the appearance of financial venality; a federal appellate court willing not only to overlook such assault on the integrity of the judiciary, but to punish the lawyers who attempted to expose same; and likewise an appellate court willing not only to ignore that it is considering a record premised in part on false testimony, sham issues and sham pleadings, but to ignore and even punish lawyers who, consistent with the



mandate of this Court, seek to disclose such a fraud on the court.

Apparently eager to bolster this disturbing mockery of the judicial system, Thoeren glosses over, yet does not deny, the hard truths presented here:<sup>1</sup>

(1) John Francis Carroll, was denominated by the Hon. Manuel L. Real as a local rule "master" to perform the judicial functions of overseeing discovery and making rulings "without motion";<sup>2</sup>

(2) Mr. Carroll could have been certified a part-time magistrate by Chief Judge Real under the Magistrates Act, with limited compensation, see p. 15, infra;

(3) Mr. Carroll was not governed by procedures for hearing and Article III

---

<sup>1</sup> "Obsequium amicos, veritas odium parit."  
-- Terence, Andria, l. 68.

<sup>2</sup> Annual total compensation to Mr. Carroll for his services plus those billed separately for secretaries, paralegals, and Mr. Carroll's associate/daughter, was in 1987 approximately \$750,000 paid by litigants under Judge Real's contempt authority. See, e.g., Pet. at 31-32; Supp. Appx. at 18-19, 28-29; n.5, below.



review, operated without formal hearings or a record, and communicated observations ex parte and extrajudicially to Judge Real, precluding formal review;<sup>3</sup>

(4) As "master", Mr. Carroll made an unsolicited, ex parte, coercive settlement overture to L&C while contempt proceedings were "pending", and on terms that could only have been favorable to Thoeren;

(5) Mr. Carroll and Judge Real resisted requests for formal disclosure of past similar appointments,<sup>4</sup> but off-the-record statements revealed as of 1987, Mr. Carroll had been a "master" for the prior ten years and his practice devoted almost

---

<sup>3</sup> Indeed, counsel for Thoeren himself cited to the district judge of the lack of procedures or Article III review by which Mr. Carroll operated. See Tr. 8/10/87.

<sup>4</sup> See International Union (UAW) v. N.L.R.B., 459 F.2d 1329, 1336 (D.C. Cir. 1972) ("when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him").



exclusively to such appointments;<sup>5</sup>

(6) The actions of Judge Real, as set forth in orders prepared by counsel for Thoeren, see Cher v. Forum International, Ltd., 692 F.2d 634 (9th Cir. 1982), including predicate orders, sanctions orders and finding of contempt, emanated, in part, from "orders", "findings", and ex parte communications by Mr. Carroll.

Thoeren does not substantively address either Judge Real's disqualification pursuant to 28 U.S.C. §§144 or 455,

---

<sup>5</sup> Thoeren, Opp. Br. at 6, misperceives Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988), evidentiary standards, and the disqualifying affidavit pursuant to 28 U.S.C. §144 setting forth the factual predicate relative to the refusals of each Judge Real and Mr. Carroll to disclose the extent of the practice and their relationship, and off-the-record statements by Mr. Carroll that he had been acting as a "master" for 10 years. Additionally, Mr. Carroll's secretary made statements to the effect that entire days in Mr. Carroll's schedule were reserved for "master" "hearings", and members of the Los Angeles legal community, including Gibson, Dunn & Crutcher and Max Blecher of Blecher & Collins confirming the long-time friendship between Mr. Carroll and Judge Real and the regular nature of the "master" appointments.



nor the procedural events resulting in Thoeren and the court flouting rules, established law, and fundamental due process rights, thereby conceding same:

(7) Judge Real enforced, sua sponte, on one hour's notice, an unsigned discovery request by Thoeren, functionally reading out of existence Fed. R.Civ. P. 26(g);

(8) The motion to disqualify Thoeren's counsel, for which L&C and Adriana International Corporation ("Adriana") were sanctioned, was based on undisputed evidence Thoeren's counsel had performed services for Adriana in matters related to this litigation, see Pet. at 56;

(9) The district court imposed and the Ninth Circuit affirmed sanctions for purported "obstructionist conduct" at a deposition despite (a) no notice and opportunity to be heard, (b) no specification as to what objections, if any, were purportedly offending, and (c) being a lump sum award without allocation to any



purportedly offending conduct; and

(10) The district court found, as affirmed by the Ninth Circuit, "the Law Offices of L. Burke Lewis" in contempt for purported failure to pay sanctions "forth-with", without regard to traditional notions of due process. Pet. at 59-61.

Nor does Thoeren seriously contest the facts surrounding the substitution of counsel for the Adriana parties, namely:

(11) The fact of false testimony, sham issues and sham pleadings, Pet. at 15, or that L&C turned down an offer of \$103,000 for legal services, conditioned on L&C's prompt substitution out of the case, and, de facto, L&C's silence.<sup>6</sup>

Similarly, Thoeren fails to contradict that the Ninth Circuit's opinion

---

<sup>6</sup> During the prolonged pendency of the substitution motion, and despite 11 briefs filed in connection therewith, no party nor judge sought the basis for L&C's assertions -- although counsel for the Adriana parties, in their reply brief, implicitly or explicitly conceded the truth of L&C's disclosures.



contained no less than 75 misstatements of law or the record, including:

(12) Ignoring the record reflecting no discovery motion nor signed discovery request ever propounded by Thoeren;<sup>7</sup>

(13) Ignoring 11 citations in the opening brief(s) to Fjelstad v. American Honda Motor Co., Inc., 762 F.2d 1134, 1342 (9th Cir. 1985), including for the very holding the opinion states was not raised;

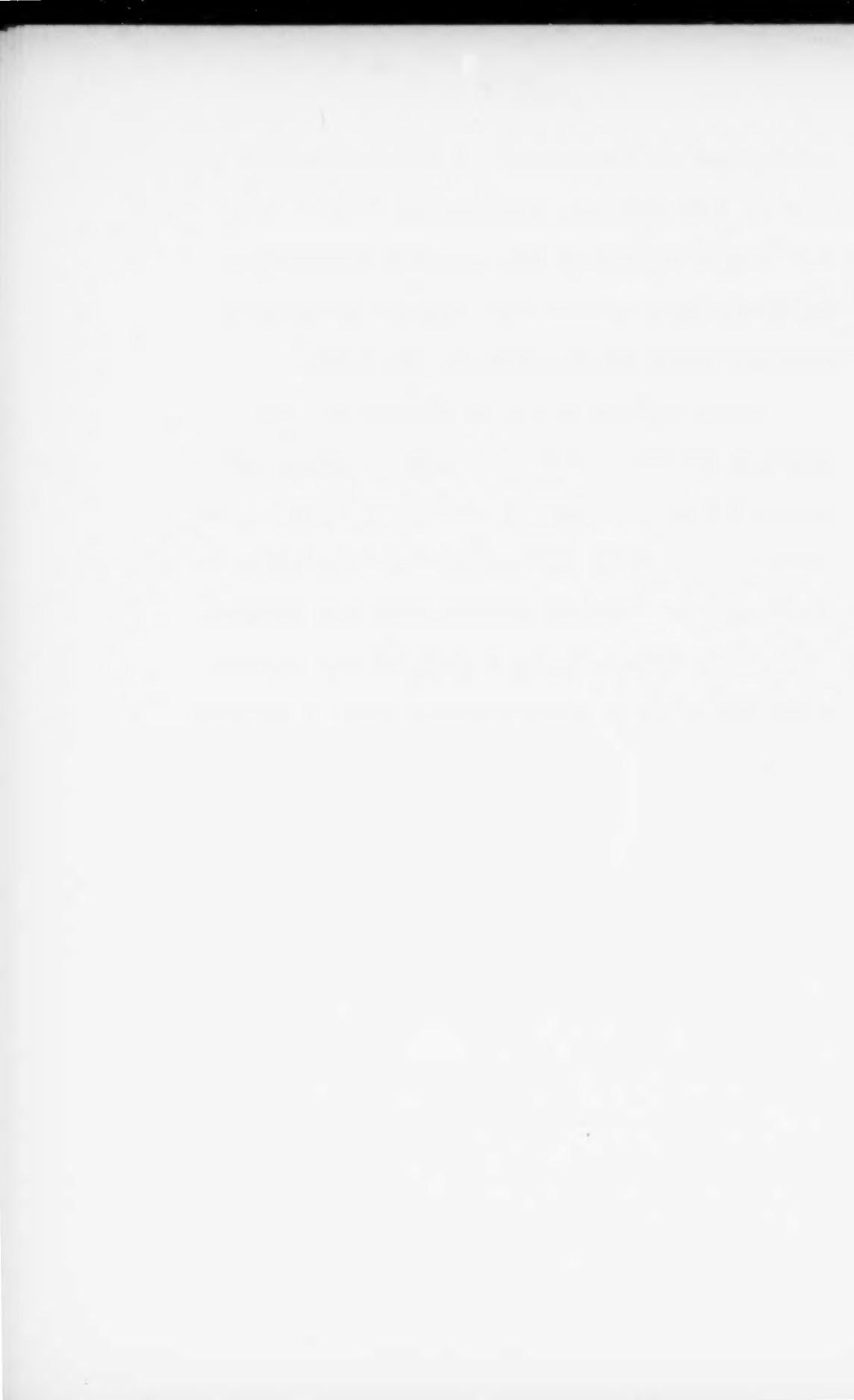
(14) Determining a motion for reconsideration as untimely based upon a deliberately inaccurate reading of Fed. R.Civ. P. 6(a); and

(15) Holding the opening briefs were "frivolous", yet simultaneously adopting the position asserted in the opening briefs that damages for emotional distress are not available on a judgment for fraud.

Finally, Thoeren does not dispute

---

<sup>7</sup> And that Adriana, through L&C, produced all nonprivileged documents in its possession, and assisted in the production of documents in the possession of its former accountants.



that the Ninth Circuit improperly denied the petition for rehearing and suggestion for hearing en banc for each L&C and the Adriana parties on the inaccurate premise the subject petitions were mailed, rather than personally delivered, to the court.

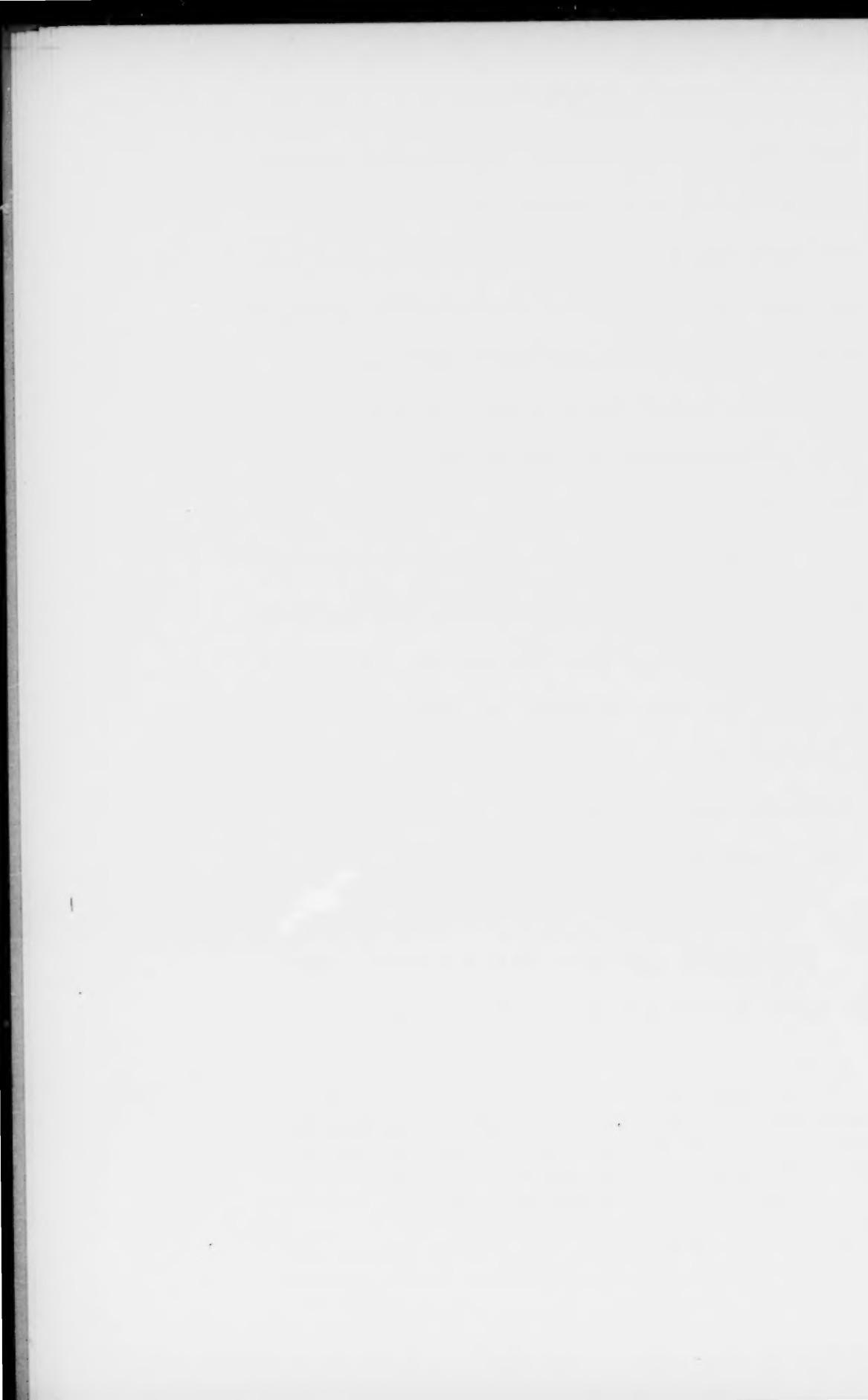
## II. APPOINTMENT OF DENOMINATED "MASTER"

### A. Petitioners Have Standing<sup>8</sup>

Thoeren's argument that L&C is without standing to challenge the appointment of Mr. Carroll, Opp. Br. at 40, fails to address (a) the finding of contempt followed Mr. Carroll's ex parte settlement overture and concomitant communications with Judge Real relative thereto, (b) the orders imposing sanctions in March, 1987, as drafted by counsel for Thoeren, were entered following a first conversation

---

<sup>8</sup> In arguing "[t]his Court should not entertain on certiorari issues which the Ninth Circuit correctly declined", Thoeren omits critical words: "not raised or resolved in the lower court." Youakim v. Miller, 425 U.S. 231, 234, 96 S.Ct. 1399, 47 L.Ed.2d 701 (1976) (emphasis added). All the issues raised to this Court were pressed to the lower courts.



with Mr. Carroll during which he made an implicit threat against L&C, if a challenge were made to Judge Real's appointing "authority", and (c) the dismissal and entry of default were premised on discovery "rulings" by Mr. Carroll, communicated ex parte and extra-judicially to Judge Real, on purported, unspecified "conduct" by L&C.<sup>9</sup> Significantly, orders imposing the terminating sanctions, with language relative to L&C's unspecified "conduct" based on Mr. Carroll's "rulings", were drafted by counsel for Thoeren. Yet now, Thoeren disingenuously claims that L&C is not entitled to complain about the underlying appointment of the purported judicial officer whose private observations and reports to the judge formed the basis for

---

<sup>9</sup> Likewise, the district court imposed sanctions for moving to reconsider the amended default judgment. It is not clear to what extent Mr. Carroll's "findings" and ex parte communications provided a basis therefor.



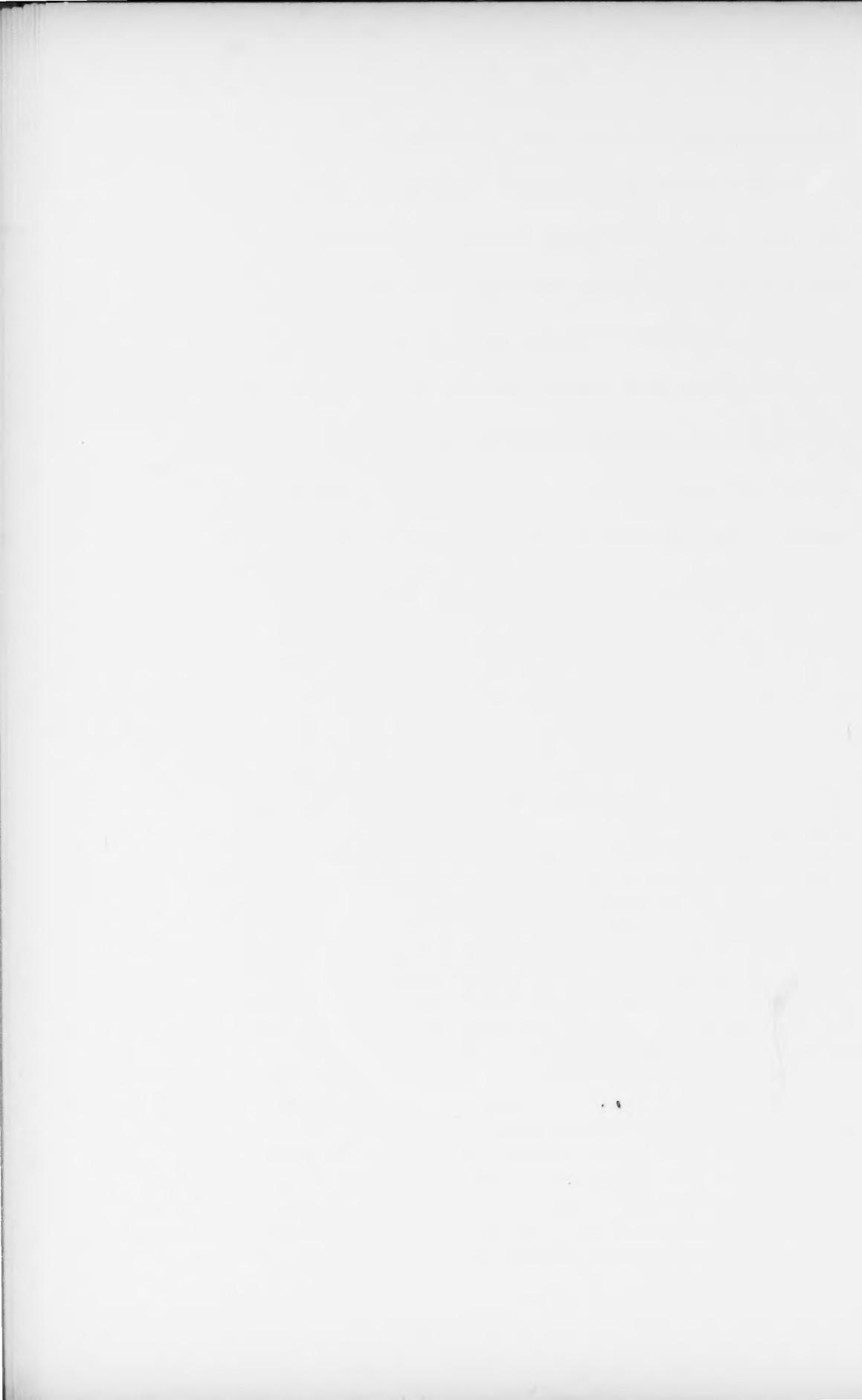
imposing sanctions and contempt.<sup>10</sup>

The orders have an "adverse effect" on L&C: not just the brunt of monetary sanctions, but the obloquy of the sanctions, contempt findings and findings relative to the terminating sanctions, see F.D.I.C. v. Tefken Const. and Inst. Co., 847 F.2d 440 (7th Cir. 1987) (a lawyer's "bread and butter" is his/her "reputation for integrity, thoroughness and compe-

---

<sup>10</sup> Thoeren misapprehends Kordich v. Marine Clerks Ass'n, 715 F.2d 1392 (9th Cir. 1982). The anomalous result created by prohibiting immediate appeals of sanctions means that the interests of counsel are equated with those of the client. If that holding is consistent with the realities of litigation and notions of equal protection and due process, it provides a further basis for L&C's standing. If the holding is not so consistent, see Pet. at 61-63, it should be overruled.

Thoeren would even preclude L&C's right to petition to overrule Kordich because L&C did not file an "interlocutory appeal" of the sanctions. In other words, because L&C complied with the Kordich mandate prohibiting such interlocutory appeals, L&C's right to be heard on the propriety of such a prohibition should somehow be eviscerated.



tence").<sup>11</sup> Thus, L&C plainly has standing. 15 Wright, Miller & Cooper, Federal Practice & Procedure, Jurisdiction, §3902 at 401 (1976 & 1990 Supp.); U.S. ex rel. Celanese Coatings Co. v. Gullard, 504 F.2d 466, 469 (9th Cir. 1974).

**B. "Waiver" Arguments are Inapposite**

Thoeren's sole substantive argument in support of Mr. Carroll's appointment (requiring Thoeren's reliance on the myth that the subject appointment was a "special master" pursuant to Fed. R.Civ. P. 53) is that objections thereto were "waived". As admitted by Judge Real, Tr. 8/10/87, and, at least implicitly, to the Ninth Circuit by Thoeren, the appointment was exclusively pursuant to Local Rule

---

<sup>11</sup> As a result of such sanctions and findings, based on Mr. Carroll's statements and ex parte communications, the Adriana parties have refused to pay L&C, i.e., threatened set-off and legal action relative to its services performed in this and other litigation involving interests of certain of the Adriana parties. See Rex Oil, Ltd. v. M/V Jacinth, 873 F.2d 82 (5th Cir. 1989), cert. denied, \_\_\_ U.S. \_\_\_ (1990).



25.10.<sup>12</sup> Unlike Fed. R.Civ. P. 53, where established authority (a) restricts the use of special masters, see LaBuy v. Howes Leather Co., 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957), and (b) allows objections to proper appointments to be waived in specified circumstances, the appointment here was made outside Fed. R.Civ. P. 53, without rules on procedures during the appointment, or what might constitute "waiver". Without such specific rule or statute-based authority, there can be no "clear and unambiguous expression of consent"; no federal court can "permit [its] jurisdiction to depend on inferences when both the statute and common sense call for precision". Alaniz v. Cal. Processors, Inc., 690 F.2d 717, 720 (9th Cir. 1982).<sup>13</sup>

---

<sup>12</sup> The omission of the 3/18/87 appointing order from the appendix to the petition, see Opp. Br. at 48, was purely inadvertent; it is attached to the appendix hereto.

<sup>13</sup> Thoeren makes no effort to reconcile his argument and Alaniz, in which Judge Alarcon,



The appointment of Mr. Carroll solely under local rule has none of the features of a Fed. R.Civ. P. 53 appointment: the appointment was to perform solely judicial, rather than fact-finding functions; Mr. Carroll's fees were payable under Judge Real's contempt authority;<sup>14</sup> there were no procedures for hearings by Mr. Carroll or review of his actions; and

---

of the panel here, participated. Although mentioning the Ninth Circuit panel allocated time for argument, Opp. Br. at 27, Thoeren fails to mention how such allocation came about: despite prior Ninth Circuit directions requiring petitioners and the Adriana parties to split their argument time, it was only when L&C brought Alaniz to the attention of the court minutes prior to argument that the panel suddenly limited L&C to slightly more than 5 minutes of argument; the moment Alaniz was raised, L&C's argument was terminated. Thoeren does not contest it is well-known that Judges Real and Alarcon are close friends.

<sup>14</sup> Thoeren makes the puzzling claim that "[t]he Lewis parties did not raise Mr. Carroll's compensation" to the Ninth Circuit, Opp. Br. at 7 n.5, ignoring that such issue was extensively discussed in Adriana's opening brief, Supp. Appx. at 18-19, 28-29 -- indeed, that is what successor counsel for the Adriana parties deemed "offensive and obnoxious"; as Thoeren elsewhere acknowledges, L&C specifically incorporated such arguments in its opening brief pursuant to Fed. R.App. P. 28(i).



rulings and observations were communicated informally and ex parte to the judge. Moreover, as an ultra vires delegation of judicial authority, the appointment violates the separation of powers doctrine inherent in the Constitution. Such a constitutional violation "cannot be waived by the parties". Pacemaker Diagnostic Clinic v. Instromedix, Inc., 725 F.2d 537, 543-44 (9th Cir. 1984).<sup>15</sup> See also North-

---

<sup>15</sup> Thoeren claims Pacemaker represents that objections to appointment here could be waived. Opp. Br. at 44-45. Pacemaker in fact holds, "the separation of powers rule that protects the integrity of the constitutional structure, as distinct from the component that protects the rights of the litigants, cannot be waived by the parties .... [T]here must be both the appearance and the reality of control by Article III judges over the interpretation, declaration, and application of federal law ...." 725 F.2d at 543-44 (emphasis added). The appointment has none of the constitutionally saving features of the Magistrates Act, as found by Pacemaker, including selections that "are not made directly dependent upon loyalty" to any single judicial officer, 725 F.2d at 545, and provisions for plenary review by Article III courts. Likewise, the 1983 Advisory Committee Notes to Fed. R.Civ. P. 53 comment on the "conformity" of the rule to 28 U.S.C. §636(b)(2) allowing a magistrate to serve as a special master.



ern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982); United States v. Raddatz, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980). No party nor judge has ever explained why Mr. Carroll has served as an illegitimate, unconstitutional "master" for 13 years, rather than a lawfully-appointed part-time magistrate, with the certification by Chief Judge Real of a bona fide need therefor -- if not for the disparity in the amount and source of compensation, ex parte communications, and suspension of the Federal Rules.<sup>16</sup>

---

<sup>16</sup> In each case cited by Thoeren for "waiver", the appointment was properly made pursuant to Fed. R.Civ. P. 53 for fact-finding functions in appropriately complex cases and/or was to a U.S. magistrate acting as a special master pursuant to 28 U.S.C. §636(b)(2) and circumstances plainly indicated waiver. Here, not only was the reference to Mr. Carroll not made pursuant to Fed. R.Civ. P. 53 or the Magistrates Act, but Adriana (a) sought relief from the Ninth Circuit on May 6, 1987, approximately 6 weeks after the appointment, for, among other things, the appointment and conduct of Mr. Carroll, including threats by Mr. Carroll of the consequences from Judge Real if the appointment were challenged, 9th Cir. Civ. Dkt.

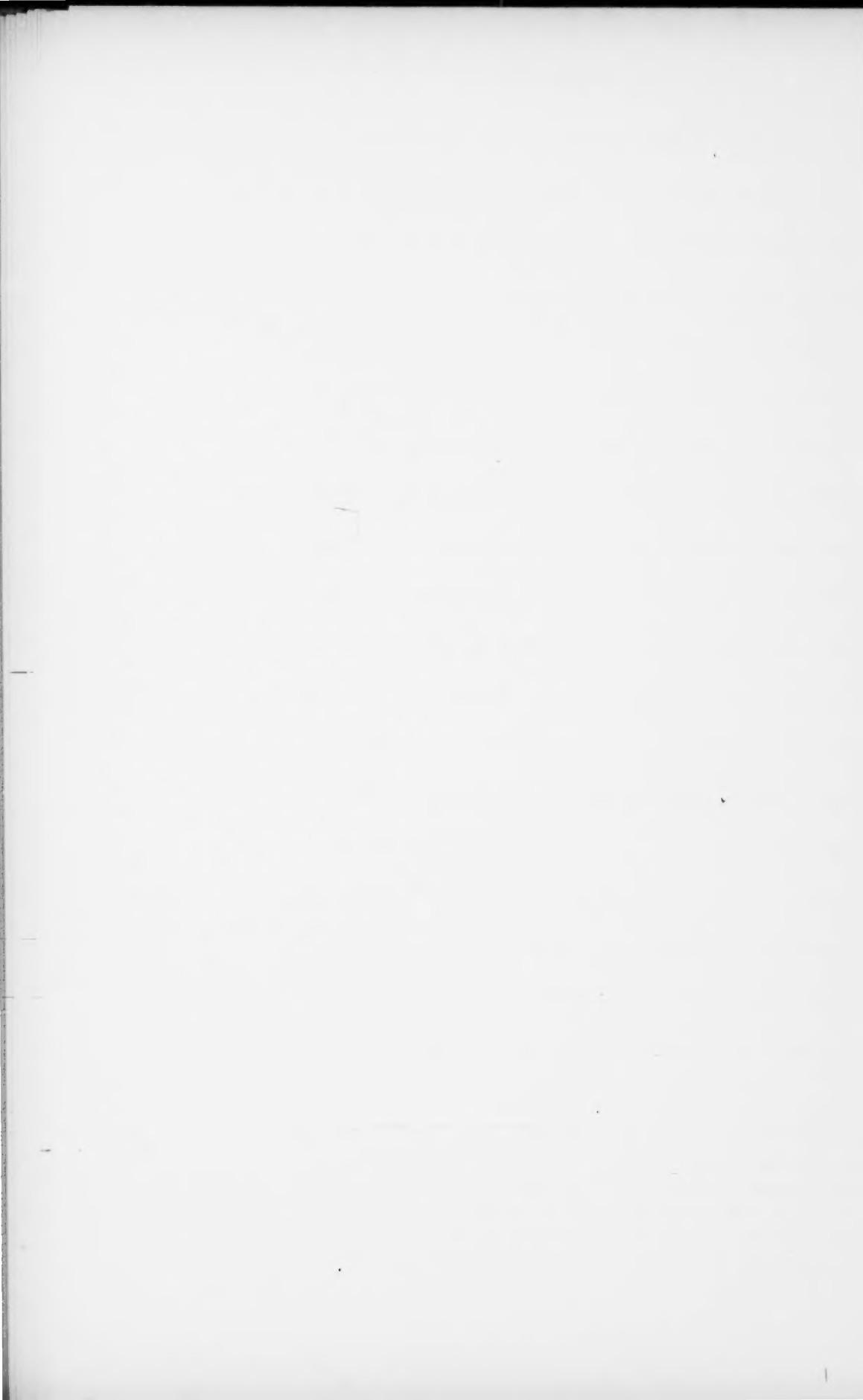


### III. SUBSTITUTION OF COUNSEL

In his scanty substantive response to the substitution issue, Thoeren misapprehends the distinction between civil and criminal cases relative to the right to counsel: criminal defendants enjoy a higher claim to counsel than do civil defendants. Petitioners do not argue that a client who intends to perjure himself "forfeits" the right to change counsel. Opp. Br. at 63. However, consistent with Nix v. Whiteside, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986), and McCoy v. Court of Appeals of Wisconsin, 486 U.S. 429, 108 S.Ct. 1895, 100 L.Ed.2d 440 (1988), and especially in civil cases where the right to counsel is circumscribed, a party intending to commit perjury or perpetuate perjured testimony

---

No. 87-5781, and (b) moved the district court in early July, 1987, after Mr. Carroll's settlement overture to L&C and before Mr. Carroll had issued any "report", to remove the reference. See also medical declarations re: counsel's surgery, Exhs. "7"--"9" to CR 125.



may not use such right to as a shield from the consequences of such perjury.<sup>17</sup>

#### IV. SANCTIONS IMPOSED BY DISTRICT COURT

In addressing arguments relative to sanctions and contempt, Thoeren overlooks constitutional issues raised by the failure to provide notice or opportunity to respond nor specification of (a) alleged offending conduct, (b) time for compliance, and (c) contemporaries. Thoeren ignores the inherent inconsistency of such orders

---

<sup>17</sup> How can Thoeren characterize false testimony and sham issues and pleadings as "unabashed lunacy", Opp. Br. at 8, when (a) the disclosures of the sham issues and pleadings demonstrated the accuracy of Thoeren's own pleadings and (b) successor counsel for the Adriana parties on reply withdrew arguments, which L&C had disclosed as false, justifying the failure of Kunz and Zade to appear for deposition. Where, then, is the "lunacy"? What should trouble this Court (and what should have troubled the Ninth Circuit), is that Thoeren and the Adriana parties apprehend as the norm violations of this Court's mandate under Nix and McCoy. What is "unbelievable" to Thoeren, Opp. Br. at 8, n.6, is not what L&C has disclosed, but that L&C turned down more than \$100,000 to so disclose. (Curiously, the Adriana parties have filed no brief or petition with this Court. Why? Why not?)



with established law.<sup>18</sup> Moreover, Thoeren ignores that imposition of sanctions and contempt by the district court (and affirmance by the Ninth Circuit) "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision", S.Ct. R. 10.1(a) -- especially where the sanctions were premised on L&C's compliance with Fed.

R.Civ. P. 26(g).<sup>19</sup>

#### V. NINTH CIRCUIT SANCTIONS

Rather than contest the argument the Ninth Circuit's opinion was riddled with

---

<sup>18</sup> I.e., relative to disqualification of counsel, see Emle Ind., Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973), Evans v. Artek Systems Corp., 715 F.2d 788, 792 (2d Cir. 1983), Global Van Lines v. Superior Court, 144 Cal.App.3d 490, 192 Cal.Rptr. 609 (1983) and Rule 11 sanctions, see Cal. Archit. Bldg. Prod. v. Franciscan Ceramics, Inc., 818 F.2d 1466 (9th Cir. 1987).

<sup>19</sup> If a discovery request or other document "is not signed . . . a party shall not be obligated to take any action with respect to it until it is signed". (Emphasis added).



errors of law and the record, Thoeren criticizes the format of the opening briefs. Opp. Br. at 19, 32 & n.13.<sup>20</sup> Consistent with the "Wonderland" view wherein compliance with the rules is grounds for punishment relative to Fed. R.Civ. P. 26(g), Thoeren characterizes L&C as having "threaten[ed]" to comply with Fed. R.App. P. 28(i), i.e., to file separate briefs on behalf of different appellants, Opp. Br. at 17, to justify imposing sanctions.<sup>21</sup>

#### VI. CONCLUSION

"The unaccountability of the courts

---

<sup>20</sup> Thoeren represents he "file[d] a single opening brief", Opp. Br. at 19, omitting reference to Thoeren's motion to file multiple briefs and to strike the opening briefs on the basis of the form and format, including allegedly having "1-1/2 line spacing", relief expressly denied by order dated August 29, 1989. Compare Westinghouse Elec. Corp. v. N.L.R.B., 809 F.2d 419 (7th Cir. 1987).

<sup>21</sup> Thoeren's string citation to appellate sanctions is inapposite. In each cited case, egregious transgressions occurred, details of which the court meticulously specified. Even then, sanctions were generally infinitesimal compared to those here.



of appeal lies ... in effective freedom from public criticism ... '[T]he opinions that Federal courts of appeal write are not criticized because they are invisible because the law professors can deal only with the Supreme Court.'"<sup>22</sup> The facts here speak for themselves. But only this Court can take action relative to these facts and assure the faithful implementation of the U.S. Constitution and fundamental concepts of due process.

Wherefore, petitioners respectfully request that this court grant the within petition for writ of certiorari.

Dated: January 30, 1991

Respectfully submitted,

LEWIS & COMPANY

By:

L. Burke Lewis  
22203 Pac. Coast Hwy.  
Malibu, CA., 90265  
(213) 317-1285

---

<sup>22</sup> Peter L. Strauss, Betts Professor of Law, Columbia Univ., N.Y. Times, 4/14/90, p.14, quoting Hon. Stephen Breyer, First Circuit.



CASE NO. 90-994

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1990

\*\*\*\*\*

LEWIS & COMPANY, LAWYERS,  
L. BURKE LEWIS, AMY J. CASSEDY,

Petitioners

vs.

KONSTANTIN THOEREN, PATROLA FILMS, INC.,  
PATROLA, G.m.b.H., ADRIANA INTERNATIONAL  
CORPORATION, HANS A.-KUNZ, KEMAL ZEINAL-  
ZADE, ANTHONY M. MIDGEN, ARIAN FILMS  
PRODUCTIONS, LTD., ARTHUR L. MARTIN,

Respondents

\*\*\*\*\*

ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
NINTH CIRCUIT

\*\*\*\*\*

APPENDIX TO REPLY TO BRIEF IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI

\*\*\*\*\*

L. Burke Lewis  
22203 Pacific Coast Highway  
Malibu, California 90265  
(213) 317-1285  
Counsel for Petitioners

Of Counsel:  
Amy J. Cassedy  
Malibu, California



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ADRIANA INTERNATIONAL	)	
CORP.,	)	CV 86-6775-R
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
KONSTANTIN THOEREN,	)	
	)	
Defendant.	)	APPOINTMENT OF
	)	MASTER

---

The Court having observed that to insure the cooperation of counsel and the expeditious completion of discovery in the above-entitled matter.

IT IS ORDERED that JOHN FRANCIS CARROLL, ESQ. is hereby appointed as special master to oversee discovery including but not limited to sitting at depositions to make evidentiary rulings and the resolution without motion of discovery disputes.



The parties shall each deposit with the Clerk the sum of \$2,500 to reimburse the expenses of the master. Those sums may be required to be augmented from time-to-time depending upon the master's services used by the parties.

Dated: March 18, 1987.

/S/

MANUEL L. REAL

UNITED STATES

DISTRICT JUDGE